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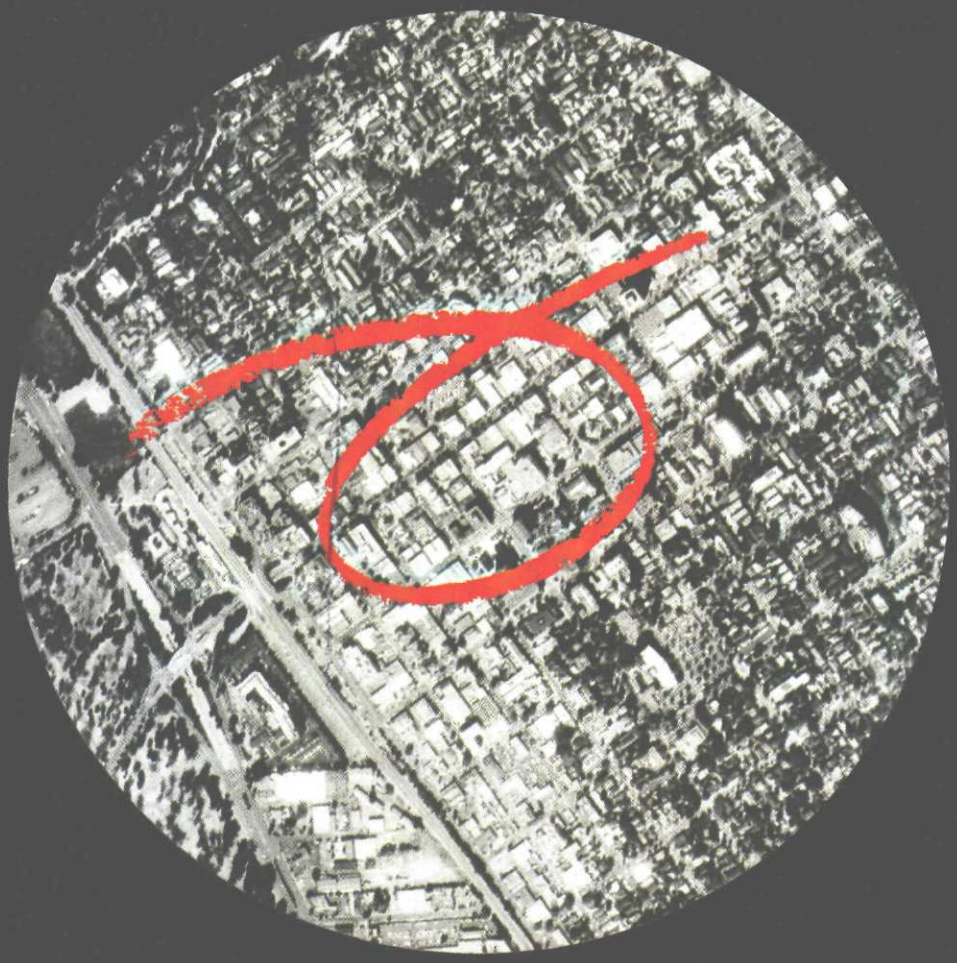
Free Minds and Free Markets



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The unsung benefits of a database nation
(see next page)

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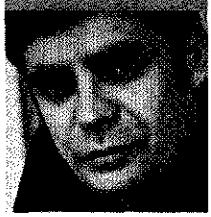
Editor's Note



Kiss Privacy Goodbye—and Good Riddance, Too

Dear MR. RON K. UNZ,

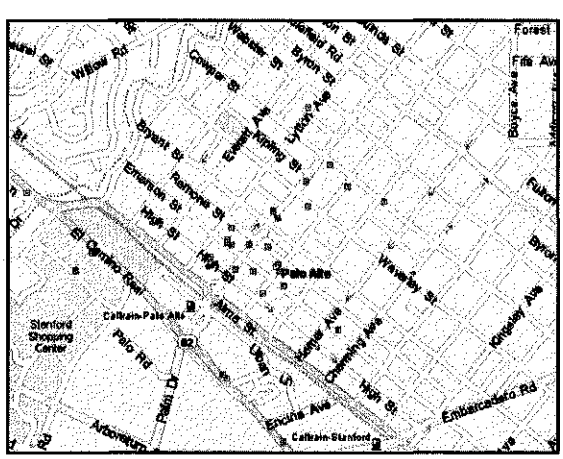
This is no ordinary issue of **reason**—or of any other magazine, either. The cover is an aerial shot of the address to which we mail your subscription. The ads on the back covers are also customized to you and your neighborhood (not a bad place, by the way, though as a telecommuter I don't envy your area's average commute of 23.09 minutes).

In collaboration with the direct marketing firm Entremedia, printer maker Xeikon, image provider AirPhotoUSA, and Cal Poly, San Luis Obispo, we're utilizing bleeding-edge technologies that allow us to tailor each copy of this month's run to most of our subscribers. That's over 40,000 unique versions in all (other readers, including the poor lugs at the newsstand, will get a generic version). This issue hints at a future of hyper-individualized publications that will be assembled for an audience of one: you. Articles, news, commentary—even ads and catalogs—could be targeted so you get only the information and offers in which you're clearly interested.

This sort of targeting relies on what we dub a "Database Nation" in our cover story, which starts on page 26. Our story explores "the unsung benefits that have accompanied the 'databasification' of American society," describing how many of the popular and convenient transactions we take for granted are the result of readily accessible information that lays you bare to the prying eyes of others. In effect, the same information networks that tell me that 80.52 percent of your neighbors have college degrees or better, or that 0.50 percent of the kids in your ZIP code are cared for by their grandparents, make it easier for you to get a credit card or mortgage. (Look below for more information on your neighbors.)

Living in a database nation raises innumerable privacy concerns. But it also makes life easier and more prosperous. We may have kissed privacy goodbye—and good riddance, too.

Nick Gillespie



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reason
Free Minds and Free Markets

June 2004
Volume 36, No. 2

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Cover Image: AirPhotosUSA

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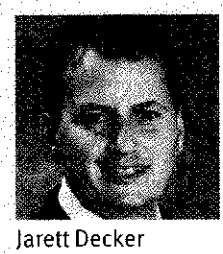

Jarett Decker

DECLAN MCCULLAGH frequently reports on threats to privacy, so you might expect him to guard his own privacy carefully. Yet "I'm listed in the phone book," he says, "and Best Buy and CompUSA have my e-mail address to send me ads for deals on gadgets." As a journalist and photographer, McCullagh suggests, he may be "biased about privacy, because both print and photography involve using people's information and images without their permission." In this issue, he explores the upside of living in a "Database Nation" (page 26). McCullagh operates the popular e-mail list Politech, was until 2002 the Washington bureau chief for *Wired News*, and is now chief political correspondent for CNET's News.com. He still refuses to sign up for one of those discount cards at Safeway.

JONATHAN RAUCH appreciates tradition: His preferred writing instrument is an Olivetti Lettera 32 typewriter, he listens to Bach and Shostakovich on a vacuum tube stereo, and he is, as he writes in "Objections to These Unions" (page 36), an admirer of Friedrich Hayek. But unlike some Hayekians, Rauch believes same-sex marriage "is a deeply conservative idea in the best sense of the word. Its natural constituency is people who believe in marriage as a stabilizing institution." Rauch's article is excerpted from his latest book, *Gay Marriage* (Times Books). He lives in suburban Virginia with his partner. They hope to marry, when they can.

Attorney JARETT DECKER got interested in legal harassment of defense lawyers in 1995, when he wrote a piece for *The New York Times* about a draconian piece of legislation introduced by Sen. Orrin Hatch (R-Utah). "I had to carry the bill around with me when I talked to other lawyers about it," says Decker. "People thought I was kidding." He examines some equally jaw-dropping provisions of the PATRIOT Act this month in "Criminal Representation" (page 44). Decker recently left private practice in Philadelphia to work as counsel for a government agency in Chicago.

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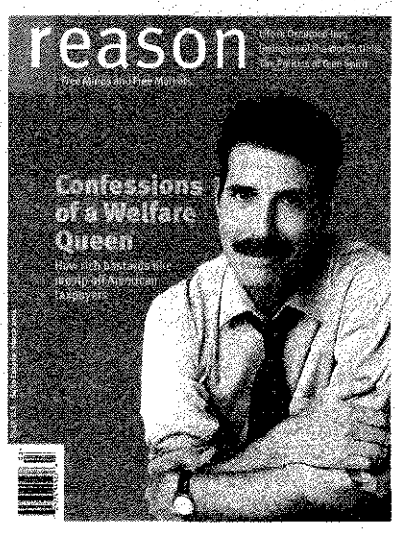

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Opening Marriage

Cathy Young seemed to imply, in "Opening Marriage" (March), that polygamy, one person having multiple spouses, is the same as polyamory. In polyamorous relationships and families, various arrangements of consenting adult men and women choose to love and support each other emotionally, spiritually, physically, and often financially. Commitment levels may vary, but love and personal freedom are prevailing factors.

Young approvingly quotes David Boaz's suggestion that polyamorists wait to get legal marital recognition until "all special laws related to marriage [cease] to exist." A group marriage would be considered too upsetting to the "social order and the raising of children." Not too long ago, however, homosexuals were considered an unfit family unit. If bisexuals can't even decide which sex to sleep with, how are we supposed to choose whether to marry one or the other? Swinging, cheating, and casual sex or dating are not options for those of us who want loving, meaningful relationships.

Young then worries that the "mere possibility of [adding multiple partners] could cause enough anxiety to destabilize a marriage." If true choice were an option, socially or legally, more people might experience...well, more people! Of course that would be destabilizing to marriage, as it is currently defined as a union between two people. No more. Ever. Unless, of course, you cheat or get divorced, which are the currently popular, far more "destabilizing" ways to experience multiple partners.

Why should the possibility of expanding a marriage leave a spouse any more anxious than the possibility of divorce? "Serial monogamy" and cheating are proof that human beings enjoy being with more than one mate in life. Polyamorists strive to act on their desires in open, honest, loving manners. Jealousy and temptation are always realities; prohibiting the true opening of marriage will not make them go away.

Jen Rog
New Paltz, NY

Cathy Young's columns are always a joy to read. Her article "Opening Marriage" highlights the quicksand of legal conundrums that could make court rulings about gay marriage a nightmare. The potential for court-ordered polygamy is one example, but only one: If the courts find a "constitutional" right for two men to marry, then under what conceivable legal standard could two brothers be barred from marrying each other? There would, of course, be none of the health concerns normally related to incest.

Regarding marriage law, libertarians need to stick with what they truly believe in: limited judicial power. The time for legalizing gay marriage, or any other social concern not explicitly endorsed by the Constitution, is when a majority of the people vote to do so—not when a few judges make the decision on their own.

Hyperion Knight
Forest Hills, NY

One can see why gay and lesbian advocates are quick to deny that gay marriage is the "slippery slope" that will lead inevitably to (gasp) polygamy and worse. It is an argument, as Cathy Young and others point out, that merits consideration. But I wonder: So what if it is a slippery slope? So what if gay marriage does lead to polygamy? Plural marriage has, so far as anyone can tell, existed as long as human civilization. It has fallen out of favor in the West in recent centuries (with the exception of

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the Mormons and a few other groups), but is it really such a terrible thing?

I suspect that most people's objections rest on images of female harems kept at knifepoint. But as long as the relationship is entered into voluntarily, I see little reason to deny men or women multiple wives or husbands. The objection that Young raises—that she suspects it would lead to "psychological abuse"—smells to me a great deal like the sort of feminism that has given to us absurdist laws and regulations governing sexual harassment in the workplace and on college campuses.

David C. Pearson
via e-mail

Confessions of a Welfare Queen

I was enjoying the article "Confessions of a Welfare Queen" until I stumbled on this bit of liberal-bashing, thrown in for no apparent reason except to break up the monotony of right-wing treachery: "'Every summer,' said Gore, who grew up in a fancy Washington hotel, 'we went back down to the farm. I was in the 4-H club.'"

I hope Stossel's fact-checkers are normally more alert. Google "Al Gore Hotel," sift through the other reporters who swallowed the same line, and you'll quickly find out the truth: When Gore was a kid, the Fairfax was not all that fancy. He lived in a hotel because his family was poor; a cousin owned the Fairfax and let them stay there for free. He did go back down to the farm, and Stossel's interjection of questionable facts to suggest he didn't is irresponsible.

If people believe otherwise, it's because of some excellent PR work by the chairman of the Republican National Committee.

Jamie McCarthy
Kalamazoo, MI

»

About This Special Issue of reason

Mike Alissi

As explained by Editor-in-Chief Nick Gillespie on page 2, this is no ordinary issue of **reason** (see "Kiss Privacy Goodbye—and Good Riddance, Too"). It represents an unprecedented experiment in hyper-individualizing a commercial print publication. The overwhelming majority of subscribers has received a magazine in which the photo on the front cover, the information in the editor's note, and the advertisements on the back covers have been customized to individual readers. Out of a total print run of about 60,000, we've produced more than 40,000 unique editions of this issue to underscore some of the benefits of living in what our cover story calls a "Database Nation" (see page 26).

If you are reading a nonpersonalized version of the magazine, you likely picked up this issue at a newsstand or at an airport. (If you *are* a subscriber and you received a generic copy of the magazine, that's either because of data unavailability or other production problems that we weren't able to correct in time for the issue's print run.)

Aerial images were obtained from AirPhotoUSA (airphotousa.com). You can also visit terraserverusa.com to access free U.S. Geological Survey satellite images for any address in the United States. The demographic data on page 2 come from the U.S. Census Bureau (factfinder.census.gov), and the street map on that page is from Microsoft's MapPoint.

Our effort to process and collect data, print the covers, and assemble the issues has been a first-of-its-kind endeavor. In some cases, there may be problems with the output. For instance, the quality of the aerial photos depends heavily on where you live. More important, the photos and demographic data may be mismatched for your address. We regret any inaccuracies even as they underscore one of the pitfalls of living in a database nation: The information in circulation is not always right. Please send error reports to me at the e-mail address below.

reason would like to thank the Institute for Justice and the Marijuana Policy Project for their sponsorship and vision in demonstrating the possibilities of variable printing technology for advertisers.

We would also like to extend thanks to the people and organizations whose long hours and hard work have made this project possible, especially Justin Garten, Calvin Lee, and Grace Fermier of Entremedia in San Bernardino, California; Denis Williams and Ivan Verheye of Xeikon America; Harvey Levenson of Cal Poly San Luis Obispo and University Graphic Systems; JR Robertson and David Lorenzini of AirPhotoUSA; and Greg Jackson and Matt Saddler of Democrat Printing & Lithographing in Little Rock, Arkansas.

Rodger Cosgrove, the head of Entremedia, deserves special thanks. Not only did Rodger introduce us to the variable printing technology, he helped to conceive the cover idea and organized the team that made it a reality. ■

Mike Alissi (malissi@reason.com) is the publisher of **reason**.

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Faith, Shame, and Insurgency

What message is to be taken from Steven Vincent's article "Faith, Shame, and Insurgency" (March) other than "the ends justify the means"?

There is no doubt that a vicious tyrant was deposed, or that Saddam Hussein deserves much worse than he has so far gotten. The underlying question, however, is not whether tyrants should be deposed, but how and by whom. Yes, Saddam deserved to be brought down. So do Kim Jong Il, Fidel Castro, and Robert Mugabe. It takes a tyrant like Saddam Hussein to bring tragedy to his people; it takes a real communist like Kim Jong Il to make statistics of them. And it takes a state apologist to try to make the world better by military means.

Do the ends justify the means? I challenge Vincent to visit Iraq five years hence. In the meantime, he can learn some of the language and then go and visit someone other than the "opinion prostitutes" at the coffeeshops.

Randal A. Anderson III
Millville, MI

Coercion vs. Consent

In "Coercion vs. Consent" (March), Randy Barnett writes that "there are very few libertarians today for whom consequences are not ultimately the reason why they believe in liberty," while Richard Epstein cheerfully agrees that libertarians are "all consequentialists now." Fortunately, this is not true. I say "fortunately" because consequentialism is philosophically indefensible as a normative theory.

The basic problem with consequentialism is that it recognizes no limit in principle on what can be done to people in order to promote good consequences. Now consequentialists insist that in the vast majority of cases, killing, torturing, or enslaving innocent people is not the best way to get good results. And of course they are right about that. But by the logic of their position the consistent consequentialist (happily a rara avis) must always be open to the possibility that killing, torturing, or enslaving the innocent might be called for under special circumstances, and this recognition necessarily taints the character of even one's ordinary relations to other people. As Immanuel Kant pointed out more than two centuries ago, to subordinate—or even to be prepared to subordinate—one's fellow human beings to some end they do not share is to treat them as slaves, thereby denying both their inherent dignity and one's own.

Many consequentialists will say that they too can accommodate ironclad prohibitions on certain actions, on the grounds that utility will be maximized in the long run if people internalize such prohibitions. This is true, but it misses the point. Once one has internalized an ironclad prohibition, one is by definition no longer a consequentialist. One cannot treat certain values as absolute in practice and still meaningfully deny their absoluteness in theory; a belief that is not allowed to influence one's actions is no real belief. Most consequentialists are morally superior to their theory and, thankfully, pay it only lip service.

David Friedman is quite right to point out, in the same issue, that "concepts such as rights, property, and coercion" are complicated and not always susceptible to clear and easy rules. But this is not an argument for making consequences the sole test of right action. What it does mean is that non-consequentialist moral considerations establish only certain broad parameters, leaving it to consequences, custom, and context to make them more specific.

The parameters are not infinitely broad, however, and I do not see how they could be broad enough to license one group of people, called the government, to reassign title to the fruits of another group's labor at the first group's sole discretion. Hence, even if taxation and eminent domain had good results—which in the long term they rarely do— they would stand condemned on non-consequentialist grounds as slavery and plunder.

Roderick T. Long
Department of Philosophy
Auburn University
Auburn, AL

In the roundtable discussion on the limits of liberty, James Pinkerton laments that libertarianism may be in danger of being regarded as a purely economic philosophy, while public attention shifts to other hot topics. I only wish that were true. Economics is what libertarianism explains best, and we should stick to pushing tax cuts, deregulation, the lowering of trade barriers, and the like.

Focus on the fiscal, my fellow libertarians. The core free-market arguments have never applied to topics like foreign policy, police and courtroom procedures, the definition of marriage, abortion, the cultural effects of immigration, or the nature of addiction as neatly as they do to the everyday buying and selling of widgets (and the everyday interference with widgets by big government). There's no shame in that.

Let the other political factions fight about Iraq, gays, and all those other things. If we don't weigh in loudly on more clear-cut (albeit sometimes boring) issues such as the need to simplify regulations, abolish the Commerce Department, privatize the Post Office, and take an immense axe to the budget, we can rest assured no one else will.

Todd Seavey
New York, NY

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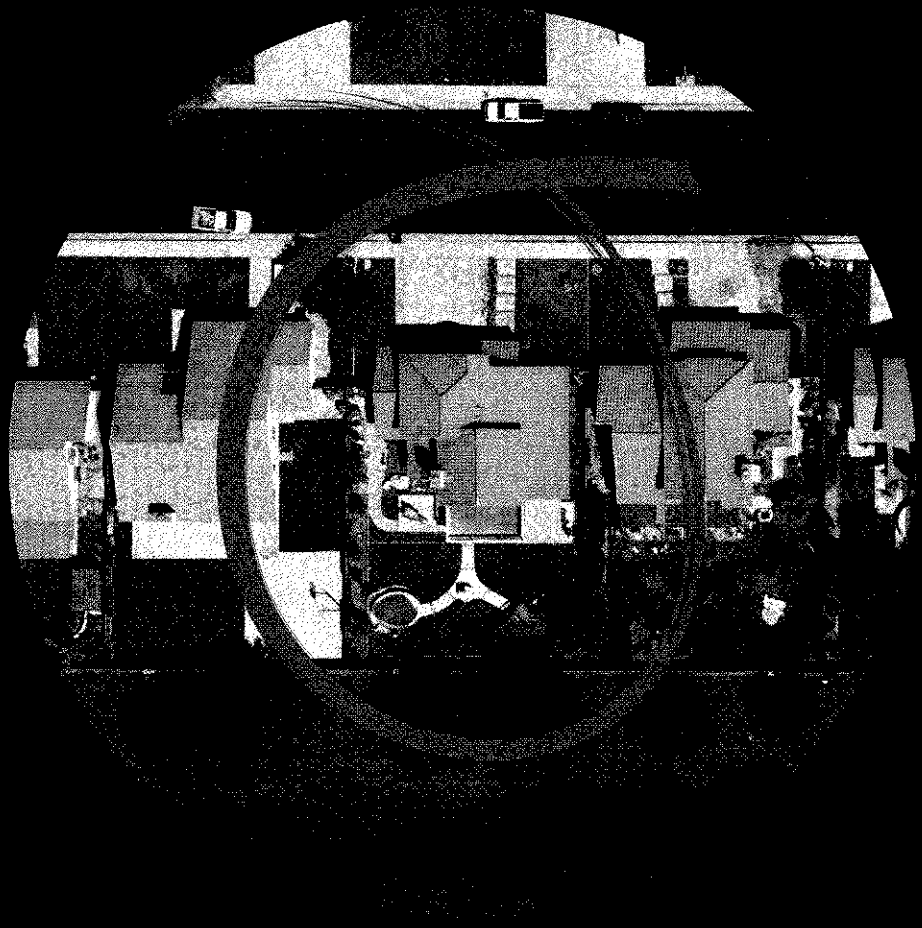

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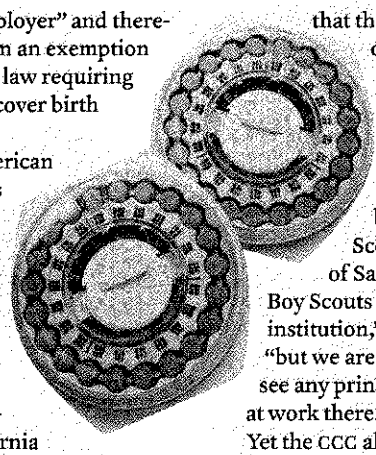
Regulating apartments away; virtual war chests; banning affection in Indonesia; mass transit boondoggles; the economics of offshoring jobs; probing privacy

Catholics and contraception

Bitter Pill

Julian Sanchez

THE POPE IS, famously, not a big fan of Ortho Tri-Cyclen. But in the wake of a decision by the Supreme Court of California, Catholic Charities of California will have to cover contraception in its prescription drug insurance for employees. According to the 6-1 ruling, because it provides "secular" services, Catholic Charities doesn't count as a "religious employer" and therefore can't claim an exemption from the state law requiring employers to cover birth control.



While American Civil Liberties Union attorney Margaret Crosby, who filed a brief against the charity, hailed the decision as a "great victory for California women and for reproductive freedom," California Catholic Conference (CCC) spokeswoman Carol Hogan is, unsurprisingly, less sanguine. The CCC, which supported Catholic Charities in court, sees this putatively economic regulation as a clear violation of the religious liberties guaranteed under the federal and California constitutions.

As Hogan observes, it's difficult to square the ruling with a number of previous decisions in the state. In the past, the state high court has agreed that Catholic hospitals and health care organizations qualify as religious employers. And in 2003 a U.S. District Court judge ruled that the Boy Scouts of America is a religious organization, invalidating a preferential contract between the Scouts and the city of San Diego. "So the Boy Scouts are a religious institution," says Hogan, "but we aren't. It's hard to see any principle but politics at work there."

Yet the CCC also makes some inscrutable distinctions. On its Web site, it argues that instead of requiring Catholic Charities to cover the pill, "the least restrictive means possible would be for the state to provide the contraceptives to those women whose religious employer declined to offer them." The sacrament of taxation apparently grants absolution to the Catholics who would still, in the end, be picking up the tab.

Regulating apartments away

Small Town Blues

Tim Cavanaugh

ZONING OFFICIALS in Manhattan, a sleepy hamlet on the banks of the Hudson, help preserve the municipality's small-town feeling through a sensible set of regulations designed to prevent rapid growth. Real estate developers are discouraged from building new units, partly to avoid the suffering (obstructed views, congestion, access problems) that new construction causes existing property owners and tenants.

Now a study from the National Bureau of Economic Research reveals just how thoroughly the unpredictable array of regulatory mechanisms and the city's reluctance to issue new building permits have distorted the real estate market. While

"Consider the effects of a right to reply law. A newspaper...could surrender its editorial prerogatives and allow politicians and bureaucrats free access to its pages....Or, it could simply refuse to cover controversial public figures."

—Robert Poole Jr., "No 'Right' to Reply"

"Businessmen are both victims and victimizers, legitimate recipients of praise—for where would we be economically without such people—and yet...legitimate recipients of scorn...for where would we be if some had not willingly participated in...corporate socialism?"

—D.T. Armentano, "Petroleum, Politics, & Prices"

"In almost every study of social affairs, scholars seek after 'the causes' of behavior—but in terms of their metaphysical viewpoint, they must *exclude people themselves.*"

—Tibor Machan, "Science, Skinner, and Human Affairs"

"[Paul Goodman's] political philosophy has always been fusionist—uniting much of what is best in conservatism and anarchism....He devised no rigid ideology, but blended the various tendencies of his thinking into a social wisdom that was both innovative and traditional."

—Ian Young, "Paul Goodman: American Anarchist"

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condo space in the Big Apple sells at around $600 per square foot, new construction costs are less than half that. Until the 1980s, even modest increases in housing prices were met quickly by new construction, keeping supply and demand in reasonable balance. The study estimates that legal limits on new housing are equivalent to a tax on existing apartments of $7,300 to $10,000 per apartment each year.

Although existing property owners don't benefit directly from the costs developers incur through the permitting process, they have a clear incentive to game the regulatory process and keep the housing supply artificially limited. The real price in a city that bends over backward to create "tenant-friendly" regulation is being paid by tenants in search of reasonably priced apartments. At this rate, New York may become another of those quaint little towns where only wealthy retirees can afford the cost of living.

Blog-based fund raising

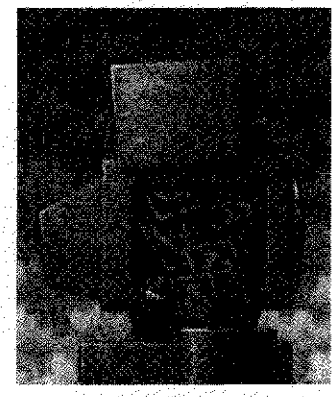
Virtual War Chests

Julian Sanchez

THE IMPLOSION OF Howard Dean led many to conclude that the hype over decentralized, Internet-driven campaigning was just one more dot-com delusion. But some candidates are discovering that there's gold in them thar weblogs.

By the start of April, readers of the liberal blogger Atrios had contributed more than $27,000 to the Democratic National Committee and over $126,000 to John Kerry's presidential campaign, including $20,771 raised on a single "John Kerry Thursday." At around the same time, readers of *The Daily Kos*, a liberal blog that tracks the details of political horse races, had dropped almost $60,000 into the DNC's collection plate and more than $48,000 in Kerry's.

The real political power of blogs, however, may be in attracting national attention—and dollars—to congressional or even local races. Kentucky Democrat Ben Chandler's campaign credits blog advertising, which brought in some $80,000 on a $2,000 investment, with helping



him win a hard-fought special election for a seat in the U.S. House of Representatives.

Weblogs hold out to candidates the promise of reaching intensely political readers who may be willing to contribute even to campaigns for seats outside their districts or states. Many of the ads now festooning liberal blogs, mostly placed via the fast-growing Blogads.com, seek to convince readers that their candidates' races have national significance. "Want to make Republicans in Washington see red?" asks an online ad for Georgia congressional candidate John Barrow. Another, for Ohio congressional candidate Jane Mitakides, implores Web surfers to "Help Jane help John Kerry!" But blogs can be a double-edged sword: After a post on *Daily Kos* expressed indifference to the deaths of American contractors in Iraq, many candidates hurriedly pulled their ads from the site.

Despite such risks, Republicans are sure to jump on the blog bandwagon soon.

Space is the place

Up, Up, and Away?

Ronald Bailey

FORTY YEARS AFTER the Wright brothers' first flight, more than 1 million people had flown in airplanes. More than 40 years after Yuri Gagarin orbited the earth, barely 500 individuals have flown in space.

It turns out that federal regulations are stronger than gravity in holding back the commercial development of space launches. In the 1970s, for example, the Carter administration banned federal agencies from using private providers to place cargoes in space. In March, in an effort to reduce the regulatory barriers to private spaceflight, the House of Representatives passed the Commercial Space Launch Amendments Act of 2004, aimed at streamlining the process for entrepreneurs to get permission to launch travelers into space.

Something similar has been tried before. Congress passed the Commercial Space Act of 1998 in the hope of jump-starting commercial development by requiring the National Aeronautics and Space Administration to buy "space-based and airborne Earth remote sensing data, services, distribution, and applications from a commercial provider." The 1998 act also removed the ban on private carriers' bringing back payloads and vehicles from space. But in 2001 the Cato Institute's Ed Hudgins testified before Congress that even after the passage of the 1998 law, "Securing permission to launch still involves safety requirements, reentry licensing, financial responsibility requirements, site operations licensing, and various environmental impact requirements. If this sort »

Quotes

"That they deceived us about the weapons of mass destruction, that's true. We were taken for a ride."

—Polish president and "Coalition of the Willing" member Aleksander Kwasniewski, to Agence France-Presse reporters, March 18

"I don't want to start banning things. Prohibition has never worked."

—Health and Human Services Secretary Tommy Thompson on removing high-calorie foods from schools, quoted in *The Washington Post*, March 9

Source

Maybe you live in one of those states so thoroughly in the grasp of the Democrats or Republicans that a vote for either seems pointless. Or maybe backing the lesser of two evils would leave you feeling dirty. Fortunately, there are scads of principled, hopelessly marginal parties and candidates for whom you can cast a purely symbolic ballot. Scope them out at www.dcpoliticalreport.com/PartyLink.htm or www.politics1.com/parties.htm. Since none of these parties has the slightest chance of capturing an office higher than municipal dogcatcher, you'll never have to kick yourself when your dream candidate proves wretched once in power. So, in the immortal words of *The Simpsons*' alien overlord Kang: "Go ahead! Throw your vote away!"

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Brickbats

Police in Victoria, Australia, plan to randomly stop people on the streets and search them for weapons. "These types of proactive approaches mean that we have intelligence-led policing that can deter crime before it happens," an official explained.

Florida news outlets sent staffers posing as ordinary citizens into 234 local agencies to see how they complied with the state's open records law. About 40 percent didn't or made unlawful demands of information seekers. Broward County Administrator Roger Desjarlais allegedly told one inquirer, whom he tracked down on the Internet, "I can make your life very difficult."

Residents of the Italian town of Reggio Emilia better take good care of their pets. They can be fined 500 euros for dyeing their pets' fur, boiling live lobsters, or failing to provide their dogs with spacious housing in the shade.

The National Aeronautics and Space Administration can't account for some $34 million in government property. The missing goods range from laptop computers to a robot.

Following a WOIO-TV report that the city of Cleveland had paid police officers tens of thousands of dollars in overtime to chauffeur Mayor Jane Campbell's daughter and her friends around, the mayor took quick action. She barred employees at city hall from talking to the station's reporters.

The Atlanta Police Department has consistently underreported crime for many years, according to an internal audit. Linder & Associates found evidence that the underreporting resulted from a combination of negligence and deliberate efforts to improve the city's image for tourism.

Norwegian school officials have told teacher Inge Telhaug not to wear a Star of David medallion in his classroom. They're worried it might provoke Muslim students.

The city of Chicago spends some $40 million a year hiring trucks. But a *Chicago Sun-Times* investigation found the vehicles do little or no work. Some of the firms the trucks are hired from seem to have no other clients, and the paper claims many are owned by mob-connected figures. Many of the firms aren't listed in the phone book, but they *are* on record as big political contributors.

Pennsylvania's Meyer Packaging closed its doors just six months after receiving $6 million in federal loan guarantees...to keep it from closing.

Two rookie police officers in Porterdale, Georgia, were suspended after allegedly betting on who could write more tickets. The pair wrote more than half the tickets issued in a single month, raising the city's citation tally to double the average.

Firefighters in Sallaumine, France, were concerned their station might be closed because there were too few calls. Now they're charged with recruiting teenagers to start fires so they could have more work.

Charles Oliver

of regime had been in place in the early part of this century, the civil aviation industry probably would still be a dream waiting for a deregulated future to be realized."

The new legislation attempts to remedy the licensing problem by locating all commercial space flight authority under the Federal Aviation Administration's Office of Commercial Space Transportation. This office is supposed to make it easier to launch new types of reusable suborbital rockets by issuing experimental permits that can be granted more quickly and with fewer requirements than full licenses.

The world's first space tourist, Dennis Tito, has declared that the 2004 amendments are "precisely the kind of legislation Congress should enact in order to give investors like me confidence that our space tourism ventures will be regulated in a fair and streamlined manner." That sounds good, but bitter experience shows that government bureaucracies hate giving up any regulatory authority. Anyone want to bet that a million people will have flown in space by 2044?

Banning affection

Kiss Off

Charles Paul Freund

INDONESIAN couples caught kissing on the mouth in public could soon face five years in the slammer, under a bill drafted in March by Jakarta legislators. "It is unclear," a dry Agence France-Presse account notes, "whether the ban would also apply to married couples."

This severe punishment of smooching is part of an omnibus legislative attack on immorality that would also impose a 10-year prison sentence for erotic dancing. That section of the bill seems to target one woman: Inul Daratista, whose talent at hip shaking has earned her both national stardom and the enmity of the nation's Islamic clerics.

Indonesia, the world's most populous Muslim country,

has long been the home of an easygoing form of Islam. Now it is a front in the pop culture war being waged throughout the Muslim world. From the Mideast to Central Asia, taboo-breaking movies, sexy music videos, pop concerts (especially by women singers), and even reality TV shows are increasingly the source of conservative outrage. A version of the TV show *Big Brother* set in Bahrain was recently canceled following escalating protests.

The Indonesian bill, Agence France-Presse reports, also criminalizes "nudity, masturbation and lewd gestures."

CAPPS II update

Will It Fly?

Brian Doherty

THE TRANSPORTATION Security Administration (TSA) still plans to launch the Computer Assisted Passenger Prescreening System II (CAPPS II) this year. But in February the General Accounting Office (GAO) issued a report pointing out that the program has not yet met seven of the eight standards Congress set for it.

CAPPS II will take the full name, home address, home

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Balance Sheet

Jeff A. Taylor

Free Head

Tennessee may follow Kentucky and Louisiana in ditching its mandatory motorcycle helmet laws.

File Finding

Canadian Justice Konrad von Finckenstein rules that music swappers do not violate Canadian copyright laws. The Canadian Recording Industry Association wanted the names of 29 file-swappers from Internet service providers.

Hull Yes

European engineers respond to an expected rampup in Baltic Sea shipping traffic with plans for new double-hulled oil tankers that should make massive oil spills unlikely. The Baltic states have shown sustained economic growth with pro-market reforms.

Digital Detente

Sun and Microsoft vow to quit warring and actually build software. Apparently, Microsoft's $1.6 billion payout to settle Sun's legal claims bought a lot of goodwill.

Rat Whole

An international team of researchers succeed in mapping the genome of the lowly laboratory rat, an accomplishment that could lead to great improvements in human health.

Autism Insight

A study published in the *American Journal of Psychiatry* purports to locate one of the genes that contribute to autism. "Identifying all or most of the genes involved," according to the study's lead author, "will lead to new diagnostic tools and new approaches to treatment."

Diet Chips

One of the first commercial DNA chips to hit the market allows for the testing of any meat product for the presence of up to 32 species of mammals. Maybe not such a great idea for hot dogs, but hey, knowledge is power.

Freeze Flap

Aussie anti-alcohol activists fret that a new vodka-flavored ice cream will hook kids on booze. But if it actually tastes like vodka, Illicit Vodka Cranberry Magnum might actually turn kids off of ice cream for life.

Bad Ads

The McCain-Feingold campaign finance law treats TV viewers in this election year to the spectacle of politicians looking into the camera and asserting they "approve of" their own ads. It's all part of making the First Amendment safe for poor, confused voters.

Perforation Prohibition

The Georgia House votes 160–0 to outlaw female genital piercing. The bill's original intent was to outlaw female circumcision; when asked about voluntary piercing, the author says, "What? I've never seen such a thing."

Gypsy Curse

A Shi'a militia group known as the Mahdi's Army goes off in central Iraq, leveling one sin-filled town and doling out 80 lashes to anyone smelling of gin.

Spy Spoof

The Army tries to assert it never suspected Muslim chaplain James Yee of spying, despite slapping him in the brig for 76 days on suspicion of spying.

Bum Rap

Police in Miami and Miami Beach have nothing better to do than spy on the entourages of rappers P. Diddy, 50 Cent, Ja Rule, and DMX. Pictures are taken of the groups when they arrive at the airport and when they go out on the town. "Our job is to know about things that could hurt innocent people," one police honcho explains.

D'oh! No!

The actors who give voice to *The Simpsons* go on strike, delaying the start of the show's 16th season.

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Data

Trade Barriers

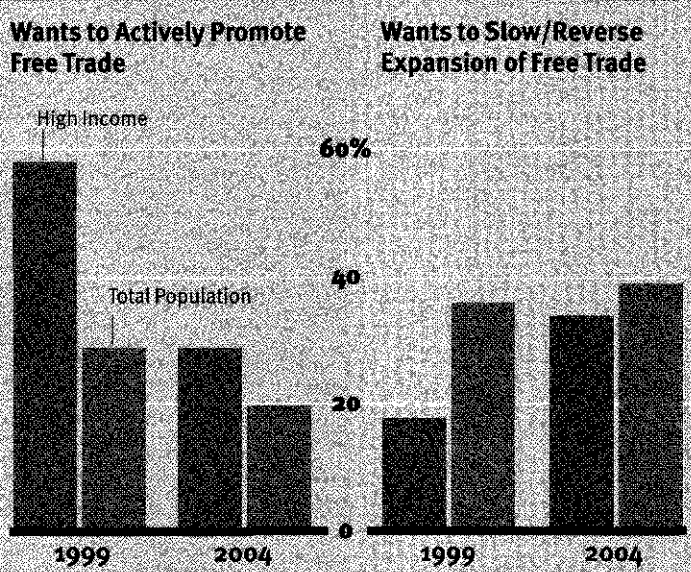
Julian Sanchez

Free trade, widely regarded as a boon by economists, has always been less popular with human beings; now its friends seem to be getting fewer by the day. A recent survey conducted by the Center on Policy Attitudes (COPA) reveals that, in the words of COPA Director Steven Kull, "feelings about international trade have gone from lukewarm to luker."

When *USA Today* requested a breakdown of the results by respondent income, a more curious trend emerged: Among those making more than $100,000 annually, traditionally the biggest trade enthusiasts, support for trade collapsed to about half the level at which it stood in 1999. During the same period, the proportion of high earners who want to slow or reverse the expansion of free trade nearly doubled. As global competition inches its way up the income ladder, it's easy to conclude that self-interest plays a significant role in the attitude change. Yet if competition is good for the auto industry, shouldn't it be equally good for the software sector?

Among the stranger results of the survey: People seem to think that trade is, on balance, good for consumers but bad for workers. Aren't they usually the same people?

Changes in Public Attitudes Toward Freer Trade



Sources: COPA Program on International Policy Attitudes, *USA Today*

phone, and birth date of every airplane traveler and check them against an unidentified array of existing public and private databases to generate a "risk category." This rating will determine whether passengers go through our now-standard screening, get set aside for especially exacting searches, or get turned over to police forthwith.

As of January 2004, the GAO reports, the TSA had not yet "determined and verified the accuracy of the databases to be used," "completed a security plan to reduce opportunities for abuse," or "developed...a process under which passengers impacted by CAPPS II can appeal decisions and correct erroneous information," among other failures.

The TSA is also behind schedule in planned initial tests of the system, "because it was unable to obtain passenger data needed for testing from air carriers, which would not provide the...data because of privacy concerns." The GAO report adds that "we lack assurance that [CAPPS II] will fully comply with the Privacy Act," since the TSA asked for exemption from seven of the law's provisions but has not yet told Congress why.

The TSA already has announced that the program could and probably will be used for more than identifying foreign terrorists. As the GAO notes, "Expanding the CAPPS II mission could...lead to an erosion of public confidence in the system" and increase the number of people erroneously detained at airports. ▯

Mass transit boondoggles

Holy Rail

Jacob Sullum

ALTHOUGH THE drawbacks of rail-based mass transit are well-known enough to have inspired an episode of *The Simpsons*, local authorities' enthusiasm for laying track seems undimmed. As a new report from the Colorado-based Independence Institute explains, "the coalition of pork-lovers, auto-haters, and nostalgia buffs" that backs rail transit over more cost-effective alternatives is hard to beat, even if you have all the facts on your side.

In "Great Rail Disasters," economist Randal O'Toole (an adjunct scholar with the Reason Public Policy Institute, which co-published the study) meticulously lays out these facts, assessing the track record of rail transit in 23 urban areas based on 13 criteria, including ridership, cost, congestion, energy use, and safety. Among other things, he shows that advocates of rail projects routinely overestimate their popularity among commuters and underestimate their costs; that such projects "can cost 50 times as much to start as comparable bus transit"; that they typically make congestion worse instead of alleviating it (for the auto haters, that result is intended); that "the average light-rail line consumes more energy per passenger mile" than cars do; and that "rails are more deadly than the alternatives in 15 out of 23 rail regions."

In short, O'Toole writes in his understated conclusion, "rail transit is not the urban savior that its advocates claim." To the

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Probing Privacy

Julian Sanchez

Jane Cuccio

Jeffrey Rosen

In the uncharted terrain that is privacy policy in the digital age, there are few compasses as reliable as Jeffrey Rosen. His new book *The Naked Crowd* (Random House) is a nuanced attempt to reconcile the demands of security with respect for civil liberties. Rosen teaches law at George Washington University and is legal affairs editor of *The New Republic*. He spoke with Assistant Editor Julian Sanchez in March.

Q: How have public attitudes about privacy and security changed?

A: We are more risk averse. I am concerned about the zero-risk mentality proliferating in Western democracies; it predates 9/11, and it's evident in our response to things like mad cow disease too. That's connected to the growth of the public opinion state and the plebiscitary presidency. Privacy won't be defended unless we care about it, and it's not clear that we do. The forces that lead people to expose themselves are many: There's a desire to distinguish yourself, the pressure of a therapeutic culture where stripping yourself bare is a way of connecting, the decline of norms of reticence.

Q: You argue that it's more productive to fight for privacy-protecting checks in surveillance technologies than to oppose such technologies wholesale. Can you offer an example?

A: One solution might be to make information traceable without being immediately identifiable. For instance, you might have a card that tells people that I'm allowed to cross an international border, that identifies certain distinguishing characteristics or releases other information at my discretion, but maybe doesn't have my address or even tell the border officers that my name is Jeff Rosen. That would, in a way, protect privacy more than the driver licenses we have now.

Q: Why do you suggest legislatures are more likely to defend privacy than courts are?

A: The idea that judges rather than legislators lead the fight for privacy is largely a myth. Consider the congressional fight against Total Information Awareness, against a national ID card, the sunset provisions in the PATRIOT Act and the efforts to repeal it, medical privacy, the regulation of wiretaps. Polls suggest that about 50 percent of the public thinks the PATRIOT Act struck the right balance, 20 percent thinks it didn't go far enough, and maybe 20 percent thinks it goes too far. Civil libertarians are decidedly a minority, yet their concerns were reflected in a way that suggests Congress is a less plebiscitary body than is usually supposed. Judges, by contrast, have tended to be relatively acquiescent in the face of executive demands.

contrary, he says, "it is clear that rail transit detracts from urban livability by far more than it adds."

O'Toole argues that transportation spending should be judged by "the cost per hour of reduced delay." By that standard, he says, a system that combined bus rapid transit with networks of high-occupancy/toll lanes charging congestion-based prices would almost always look a lot better than rail.

O'Toole notes that "the biggest problem with rail transit is its great cost, which imposes a tax burden on urban areas most of whose residents rarely, if ever, use rail transit." In most places, he argues, the expense and inconvenience of taking trains, especially as compared to driving, will prevent them from becoming a popular option. But politicians eager for federal subsidies are still willing to spend the lion's share of their transportation budgets on rail systems. O'Toole illustrates this disconnect with a quote from the satirical newspaper *The Onion*: "98 percent of Americans support the use of mass transit by others." ▪

The economics of offshoring

Importing Affluence

Adrian Moore

Democrats and Republicans are now engaged in a partisan Three Stooges slap fight over who is more outraged by offshore outsourcing. Wasn't it just a few months ago that both parties were trying to outdo each other in their support for free trade?

"Offshore outsourcing" (or *offshoring*) is the fashionable term for the recent uptick in service jobs contracted to firms in India, China, and other developing nations. Consultants who help companies arrange offshore outsourcing agreements predict it could affect up to 3.3 million jobs by 2015. Take away the marketing hype, and it could still easily be 2 million.

Lost in the concern about offshoring is the fact that the money companies save by sending rote work overseas is invested in more creative jobs here in the U.S., a point made by a recent Institute for International Economics study (downloadable at www.iie.com/publications/papers/kirkegaard0204.pdf). Analyzing Bureau of Labor Statistics data and outsourcing studies, the report finds that while more than 70,000 computer programmers have lost their jobs since 1999, more than 115,000 higher-paid computer software engineers have been hired. In fact, most of the jobs that will go offshore pay less than the U.S. average wage and are likely to be eliminated through technology whether sent overseas or not.

Meanwhile, in a paper for Deloitte Research called "The Macro Economic Case for Outsourcing," economist Carl Steidtman shows that the U.S. exports many more services than it imports and that "the benefit of importing services is the same benefit that comes from importing goods." Improved productivity lowers prices and pushes up wages and profitability, which in turn creates new jobs. ▪

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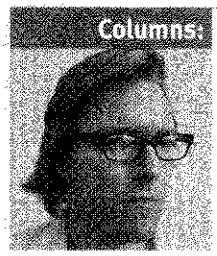

Fair-Weather Friends

When journalists desert from free speech battles

On March 1 the Santa Monica radio station KCRW, the most lucrative link in the National Public Radio chain, fired the Los Angeles humorist Sandra Tsing Loh for saying the word *fuck* in a pretaped commentary. It was supposed to be bleeped for comic effect, but the engineer forgot and Loh didn't stick around to make sure. The piece ran twice on Sunday morning, February 29; by Monday, KCRW General Manager Ruth Seymour, a past recipient of the *Los Angeles Times* First Amendment Award, had given an apologetic Loh her walking papers.

"It is the equivalent of the Janet Jackson performance piece, and there is not a radio or TV programmer today who does not understand the seriousness involved to the station," Seymour told Reuters. "You cannot say 'fuck' on the air, period," she explained to the *L.A. CityBeat*. "We could lose our license."

Even though no radio station has ever lost its license over an unintentional *fuck*, this was a clear-cut free speech issue. When one of the West Coast's most respected media organizations cites fear of a shutdown as the reason to fire a 42-year-old mother of two who was in the midst of a five-part series on knitting, the justification is either an example of the chilling effect that government regulation has on speech or an inflammatory excuse to get rid of an unwanted employee. Either way, damage was done to the climate for free expression on the airwaves.

You would think that reporters, broadcasters, and other professed free speech enthusiasts would be virtually unanimous in their opposition to the firing—especially given that KCRW immediately erased Loh's entire six-year archive from its Web site and issued a damage-control press release that included the creepy phrase "pre-emptive distancing." But you'd be wrong.

"Oh, please," KNX-AM news radio anchor Dave Williams wrote to LAradio.com. "The woman dropped an F-bomb on a microphone. We don't do that, period."

With the sole exception of satirist Harry Shearer, none of KCRW's high-profile on-air personalities even sent Loh a note of support or regret. On the letters page of the *L.A. Times* and in the comments section of the local media weblog *L.A. Observed*, a surprising number of journalists thought the more appropriate response was to trash Loh's work and character.

Freelancer Dawna Kaufmann said the monologist was acting "like a victim, a martyr and a total sociopath"; colorful descriptions from others included "scatological gutter-mouth," "five-minute-a-week bonbon," and "over-the-hill Valley Girl." Lawyers wrote to *L.A. Observed* arguing vehemently that "this is not a free speech issue because the [Federal Communications Commission] took no action." (UCLA constitutional scholar Eugene Volokh, by contrast, noted, "If rational fear of government punishment...helped contribute to the firing, then there is a free speech issue.")

The Loh incident was a timely and important reminder that when it comes to free speech, journalists can be fair-weather friends, using remarkable inventiveness to avoid the core issue if the conflict involves participants they either love or hate. This principle has been demonstrated repeatedly since Janet Jackson flashed her tit during the Super Bowl, an event that triggered obnoxious congressional hearings, a spate of FCC fines, Clear Channel's decision to stop airing the boundary-pushing DJs Bubba the Love Sponge and Howard Stern, and the

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terrible Broadcast Decency Enforcement Act.

The latter is a House bill, being debated by the Senate at press time, that increases the maximum federal fines for every individual case of broadcast indecency from $11,000 for individuals and $27,000 for stations to $500,000 for each.

The scale and stakes were much bigger than in Loh's mini-controversy, but the journalistic evasions were largely the same: Stern is hardly a "poster child" for free speech; you gotta draw the line somewhere; and isn't the real problem media consolidation?

"As a big fan of the First Amendment, I'm as reluctant as anyone to urge curbs on speech," wrote *Orlando Sentinel* columnist Kathleen Parker, in a piece that unreluctantly urged curbs on speech. "But as an even greater fan of civilization, I'm having a hard time mustering sympathy for shock jock Howard Stern."

Parker's larger point is commonly made: "We shouldn't be confused by the inevitable laments about the erosion of free speech. In the free marketplace, you're welcome to say whatever you like, but if people don't want to buy whatever you're selling, no whines. As long as the airwaves remain in the public domain, the public has a right through its government to stifle the profane rants and juvenile outbursts of our lesser-evolved brethren. Ain't democracy grand?"

Ain't logic grand? In a truly "free marketplace," one that followed the letter of the First Amendment's requirement that "Congress shall make no law...abridging the freedom of speech, or of the press," the broadcast airwaves would be just as uncensored as satellite radio or cable TV, and more spectrum would be opened up for new stations.

But theoretical ideals aside, Stern was dropped from six Clear Channel stations not because the free market was deserting him (indeed, Stern claims he was No. 1 in all six cities) but because Clear Channel executives felt compelled to change the company's policies on the day before they were scheduled to testify under oath at the congressional indecency hearings.

Similarly, when Cumulus banished the Dixie Chicks from its airwaves after lead singer Natalie Maines told a London audience she was "ashamed" to hail from the same state as President Bush, many self-described civil libertarians made the point that, after all, Cumulus is a private company and is free to air whomever it likes. That is true, of course. But defending freedom of speech is more than just respecting private property. It's expressing support for the climate of free-wheeling expression.

> When it comes to free speech, journalists can be fair-weather friends, using remarkable inventiveness to avoid the core issue.

When the Chicks were punished even after Maines' immediate apology, it was amazing to see how many of Parker's fellow First Amendment "fans" responded by demonstrating a sudden enthusiasm for music criticism, or career advice for top-selling bands, or for most anything that diverted attention away from the core truth: that an artist's work was being suppressed in response to a mildly intemperate and unpopular political statement.

No, the Chicks-Nix was not a First Amendment issue (as John McCain complained, inaccurately); and yes, it's always fun to mock millionaire celebrities who take their hyperbolic Persecution For Dissent straight to the bank. But a climate in which a popular singer becomes the target of a boycott for a single political sentence is one in which a much less popular singer knows to keep his mouth shut, unless it says something in favor of the Iraq War.

Speech has consequences, obviously, but the ideal consequence is speech in rebuttal, not suppression. This is usually felt most keenly by those who agree with the controversial political statement in question. One of the biggest and most prolific supporters of Howard Stern during the shock jock's FCC trouble this year has been the weblogger Jeff Jarvis of BuzzMachine.com—who happens to be a longtime fan of Stern.

Yet just a year ago, the same guy, who has been writing an invaluable Daily Stern roundup of all indecency-related news for several weeks running, found it humorous to refer to the Dixie Chicks as "the Vichy chicks," in part no doubt because Jarvis was just as vehemently in favor of the war that Maines was against.

There are two essential preconditions for the government to infringe upon the free press. One is a bureaucracy that values its own political existence higher than the Constitution—a virtual guarantee. The second, much less remarked upon, is a compliant press. When I was getting started in journalism during Ronald Reagan's second term, the ethics and constitutionality of drug testing

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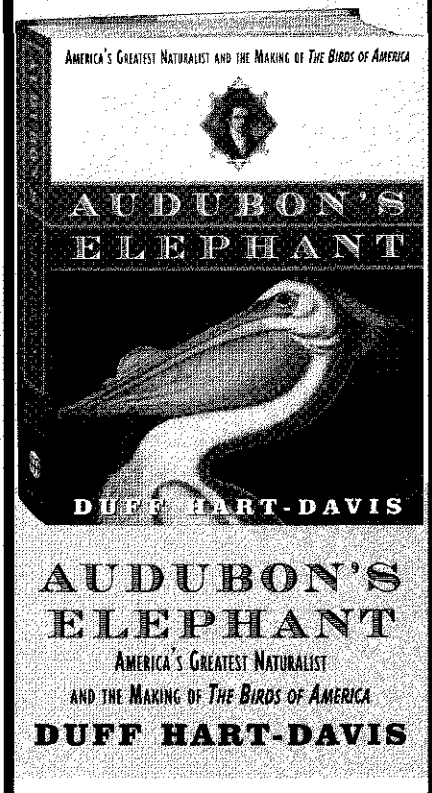
A vividly illustrated account of John James Audubon's struggle to complete his masterpiece, *The Birds of America*


America's Greatest Naturalist and the Making of The Birds of America
AUDUBON'S ELEPHANT
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AUDUBON'S ELEPHANT
America's Greatest Naturalist and the Making of The Birds of America
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—*The Wall Street Journal*

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—David Allen Sibley, *The Boston Globe*

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was a hot topic in the country and especially in newspapers. Now you almost never see it mentioned outside the sports pages, where more urine testing is always better. Not uncoincidentally, most major newspapers now submit new employees to mandatory drug tests. The journalists rolled over, moved on, and quickly grew weary of the topic.

Since reporters probe the First Amendment's boundaries every day, checking their pulses on issues regarding the climate for free speech can be a good preliminary indicator of the patient's overall health. If that's true, then we have reason to be worried—while the Bush Administration erects wall after wall between the truth and the American people, and adopts policies specifically designed to limit Americans' freedom of expression, some journalists are responding not with howls of outrage, but requests for more.

When the public or the press gives bureaucrats an inch of regulatory authority over speech, the instinct is to take a mile. In March the Senate Commerce Committee came within a single vote of passing legislation that would have expanded limits on "indecency" to satellite and cable.

Much further off the radar screen, the Treasury Department's notorious Office for Foreign Assets Control has issued a series of rulings during the last several months prohibiting American publishers from editing so much as a single comma when printing works originating from Iran, Cuba, Libya, and Sudan, using the absurd argument that it will help "protect American citizens."

Yet some journalists keep egging the government on. In March, Patrick Goldstein, "Big Picture" columnist for the *L.A. Times*, actually urged Congress to hold annual hearings to grill entertainment executives on whether their product has "any artistic value." Like many critics who conflate the indecency debate with media consolidation, Goldstein expressed support for increasing FCC fines.

How threatening individual broadcasters with penalties of half a million dollars per incident will help "the little guy" is beyond my comprehension. But Goldstein is positively thrilled at the emergence of a coalition to trash the First Amendment: "It's not a pure liberal-versus-conservative issue anymore—and therein lies hope."

The real hope lies in refusing to let free speech battles be outsourced solely to journalists. In Sandra Tsing Loh's case, after dozens of regular KCRW subscribers wrote in to announce their withdrawal of financial support, General Manager Seymour caved and offered Loh her job back in a better time slot. Loh declined, then moved over to cross-town NPR rival KPCC.

"Unlike so [much] of my other work," Loh said at her victory party, "my firing has proven to be both a critical and popular success." In an ugly election year, one hopes the public support she received will set a precedent. ▮

Contributing Editor Matt Welch (mwelch@reason.com) writes about media and politics for Canada's National Post and blogs at mattwelch.com.

reason News
We're happy to announce the July publication of Senior Editor Brian Doherty's *This Is Burning Man* (Little, Brown).

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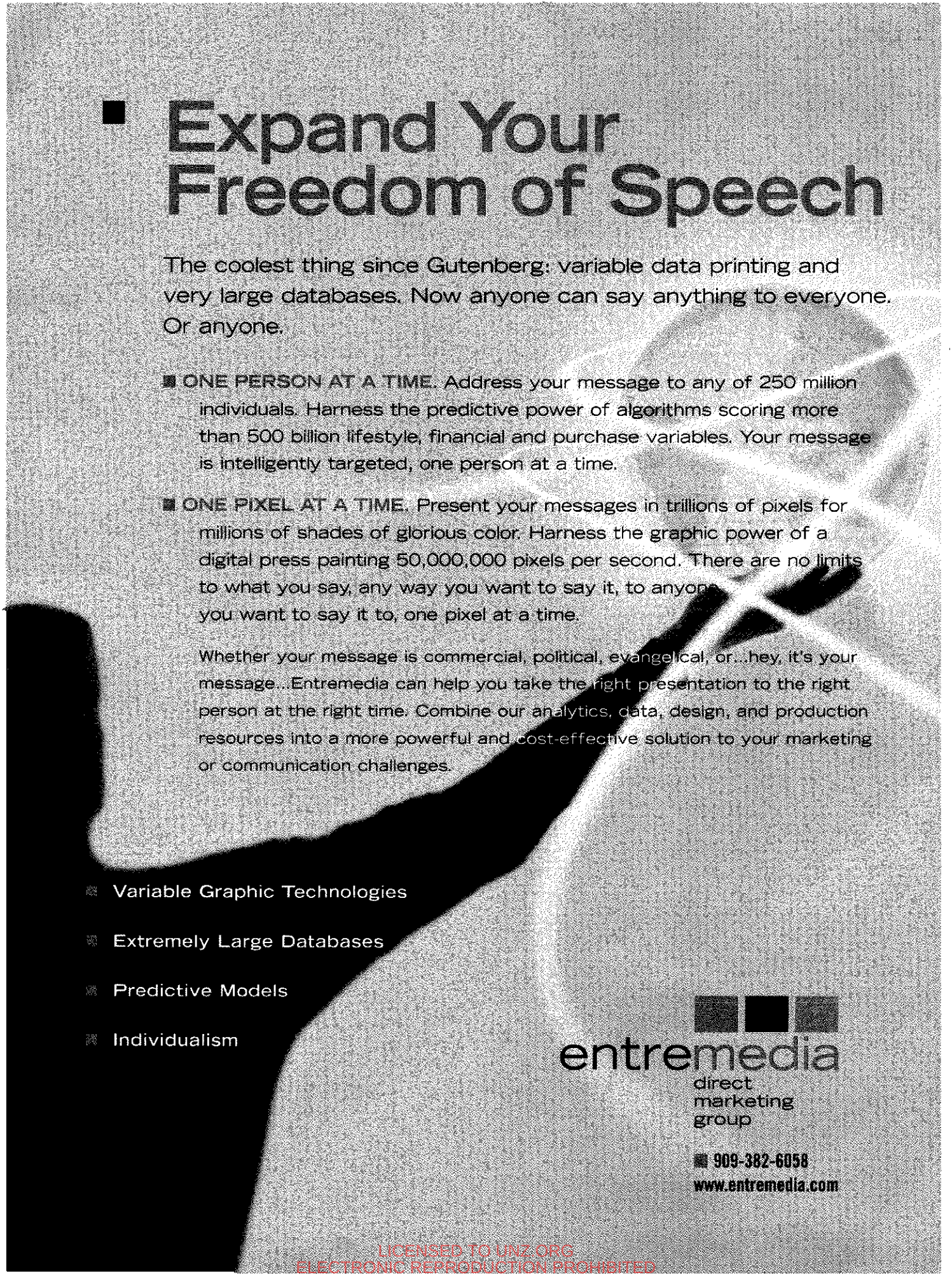

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Opting Out

The press discovers the mommy wars, again

EVER SINCE THE rise of the modern women's movement in the 1960s, two genres of "trend" stories have periodically appeared in the media: stories about women advancing into new, non-traditional roles, and stories about women going back to traditional roles. Far from following a progress-backlash pattern, these stories often coexist, though perhaps not too happily, side by side.

The latest trend story involves professional women "opting out" of the career track to raise children. In October 2003, *The New York Times Magazine* ran an article by Lisa Belkin, "The Opt-Out Revolution," that examined the phenomenon of highly educated, successful women giving up or curtailing their careers.

Pointing to several well-known women who had left top-level leadership positions to spend more time with their families—among them Karen Hughes, a former adviser to President Bush, and Brenda Barnes, a former president of Pepsi-Cola North America—Belkin wrote: "Why don't women run the world? Maybe it's because they don't want to." Several months later, the cover of *Time* magazine offered "The Case for Staying Home: Why More Young Moms Are Opting Out of the Rat Race."

It's amusing to see the "opting out" trend treated as news, considering that the story has been around for the last 25 years or so—that is, for as long as women have been on the career track in significant numbers. In the 1980s, articles about career women "bailing out" famously raised the hackles of Susan Faludi, author of the 1991 bestseller, *Backlash: The Undeclared War Against American Women*.

Today the topic continues to stir controversy. A critique of "The Opt-Out Revolution" in *Salon* elicited letters slamming Belkin's article as "clueless," "horrifyingly retro," "dangerous and almost misogynistic." You'd think Belkin had suggested repealing women's right to vote. Indeed, the syndicated columnist Bonnie Erbe invoked this very parallel: "This is hardly the first time some women with particular...agendas have tried to turn back decades of advancement forged by other women," she wrote, pointing to the anti-suffragist women who scoffed at the 19th Amendment.

Meanwhile, at the other end of the spectrum, the conservative activist Phyllis Schlafly gleefully touted Belkin's story as evidence that feminism had been "mugged by reality."

Does the "opting out" trend really exist? Erbe asserts that Belkin's claims are based on shaky data: The finding that only 38 percent of women who graduated from Harvard Business School in 1981, 1985, and 1991 now work full-time came from a survey with a very low response rate. But clearly, many professional women scale back or give up their careers for family reasons—and there is some evidence that more women than before are making this choice.

Catalyst, a respected research and consulting group focusing on women in business, reports that one in three women with MBA degrees are not working full-time (compared to just 5 percent of the men). According to the Census Bureau, 36 percent of women with college degrees who'd had a child in the previous year were staying home in 2002, up from 32 percent in 1995. Overall, the work force participation of married women with children under 6 slipped from an all-time high of 63.7 percent in 1998 to 62.5 percent in 2001.

This hardly amounts to a "revolution." It's not even necessarily a steady trend. But these numbers don't tell the whole story either. Many

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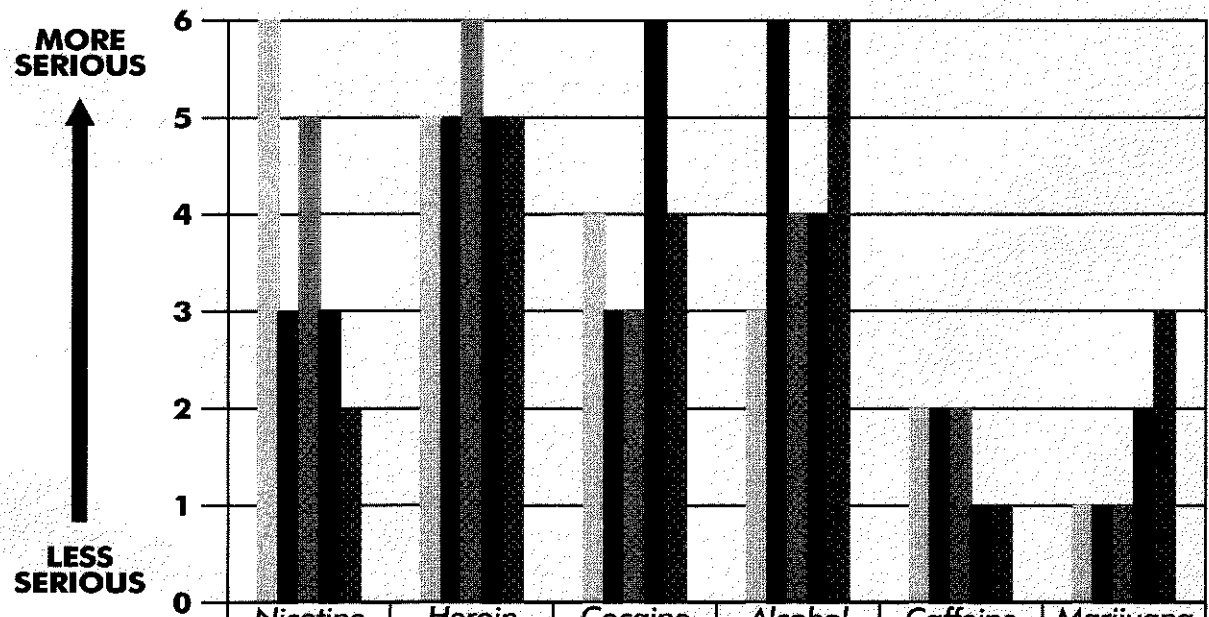
Do Our Drug Laws Focus on the Truly Dangerous Drugs?

Comparing Dangers of Popular Drugs

(Lower score indicates less serious effect)



	Nicotine	Heroin	Cocaine	Alcohol	Caffeine	Marijuana
DEPENDENCE	6	5	4	3	2	1
WITHDRAWAL	4	5	3	6	2	1
TOLERANCE	5	6	3	4	2	1
REINFORCEMENT	3	5	6	4	1	2
INTOXICATION	2	5	4	6	1	3

Source: Dr. Jack E. Henningfield, Ph.D. for NIDA. Reported by: Philip J. Hilts, *New York Times*, Aug. 2, 1994
"Is Nicotine Addictive? It Depends on Whose Criteria You Use."

Does Jailing Marijuana Users Make More Sense than Jailing Coffee Drinkers?

www.CommonSenseDrugPolicy.org, www.DrugWarFacts.org, www.MedicalMJ.org
Mike Gray, Chair; Robert Field, Co-Chair; Kevin Zeese, President – 717-288-0600 – info@csdp.org

Dependence: How difficult it is for the the user to quit, the relapse rate, the percentage of people who eventually become dependent, the rating users give their own need for the substance and the degree to which the substance will be used in the face of evidence that it causes harm.
Withdrawal: Presence and severity of characteristic withdrawal symptoms.
Tolerance: How much of the substance is needed to satisfy increasing cravings for it, and the level of stable need that is eventually reached.
Reinforcement: A measure of the substance's ability, in human and animal test, to get users to take it again and again, and in preference to other substances.
Intoxication: Though not usually counted as a measure of addiction in itself, the level of intoxication is associated with addiction and increases the personal and social damage a substance may do.

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mothers who are in the labor force are employed part-time or are self-employed, and still others who work full-time don't pursue promotions. Belkin herself left the *Times* newsroom, giving up the chance for a top editorial slot, to work as a home-based writer.

It's an open secret that child rearing is a major factor in the so-called glass ceiling. Thus, the American Bar Association's 1995 report on women in the legal profession, which pointed to the low numbers of female partners in big law firms as solid proof of discrimination, also acknowledged that women "often base their choice of work environments on how their environment can accommodate their personal needs," including family life.

> For the new generation of parents, rigid division of gender roles is obsolete—and so is the stark dichotomy of Superwoman vs. Supermom.

Blaming the lack of family-friendly policies hardly resolves the dilemma: In European countries such as Sweden, family-friendly policies often keep women on the mommy track. In the March 2004 issue of the left-of-center magazine *The American Prospect*, Margaret Morganroth Gullette, a women's studies scholar at Brandeis University, issues a numbingly familiar battle cry for a "vast radical and feminist agenda" including "affordable, high-quality child-care and after-school programs, run by well-paid and well-trained and caring teachers." But as the psychologist Daphne De Marneffe—no conservative—argues in her new book, *Maternal Desire: On Children, Love, and the Inner Life*, the day care solution ignores "the value people place on caring for their own children, and their desire to do it themselves if they can."

One could argue that child rearing should be shared equally between the sexes. Perhaps some day it will be; we have already made strides in that direction. In a 2000 Harris poll, more than four-fifths of men in their 20s and 30s said that a work schedule that allowed for family time was more important to them than a challenging or high-paying job. Yet for the time being, most women and men, even those with egalitarian ideals, seem comfortable with a certain degree of traditionalism in family roles.

These unliberated tendencies irritate some feminists to the point of recklessness. In *The American Prospect*, Gullette concludes her article with a warning to straight young women who want marriage and children: "Until the revolution comes, they would do well to be a little wary."

Most young women today, having grown up with the assumption of equality, are largely free from guilt about letting feminism down if they leave the fast track. This is probably one reason more women are putting family before career.

Another factor may be that for the younger generation, flexibility is normal. The old, linear "male" model of corporate success—defined as a steady climb from an entry-level position to the highest status one reaches before retirement—has changed, and not just for women. In its place, there is a rich variety of paths that include self-employment, entrepreneurship, and midlife career changes. Women who move in and out of the work-

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force, or find creative ways to balance work and child rearing, are very much a part of this larger revolution.

The "unfinished revolution" in family roles poses its share of problems. The equilibrium it creates between the sexes is an uneasy one. Currently, women have more freedom than men in choosing whether and how much to work, but they also bear the burden of grappling with those decisions. The "mommy wars" are likely to persist as well: It's difficult to vindicate stay-at-home motherhood without suggesting that working mothers are neglecting their children, or to vindicate working mothers without making stay-at-home mothers feel that their role is not essential.

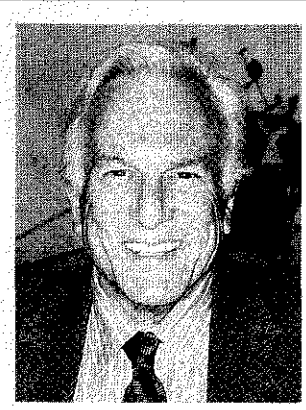
Still, flexibility and freedom are vastly better than the alternatives. By and large, for the new generation of parents, rigid division of gender roles is obsolete—and so is the stark dichotomy of Superwoman vs. Supermom. That's a good start. ▮

Contributing Editor Cathy Young (CathyYoung1@cs.com) is a columnist for The Boston Globe.

reason News

We're pleased to announce that Assistant Editor Julian Sanchez was named runner-up in the Institute for Humane Studies' annual Felix Morley Journalism Competition. We're also pleased to announce the paperback publication of Managing Editor Jesse Walker's *Rebels on the Air: An Alternative History of Radio in America* (NYU Press) and Senior Editor Jacob Sullum's *Saying Yes: In Defense of Drug Use* (Tarcher/Penguin).

A Philosophy for Living on Earth



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The Age of Uncertainty

All we know is that we know something.

So, how's it going in Iraq? No, really. As we learn to measure the U.S. engagement there in years and (let's face reality) decades, only this much seems absolutely beyond question: On a very basic level, it's virtually impossible to know whether the occupation is going well or horribly wrong. This is above and beyond the question of whether we should be there in the first place.

Walter Lippman once famously suggested that it was hard enough figuring out what was really going on in the neighborhoods of Manhattan, let alone the far-flung nations of the world. Most of us, even the CNN and Fox News obsessives, are relying on second-, third-, and fourth-hand reports by people whose best efforts to understand, say, the Sunni Triangle, are about as reliable as the restaurant prices in a 20-year-old copy of *Let's Go: Iraq*.

For every shot of mutilated American corpses being dragged through the streets of Fallujah, there are accounts of relatively orderly elections being held in other parts of the country—elections, moreover, in which Islamist candidates have been doing poorly. For every call to avoid another Vietnam, there are reminders that overwhelming majorities in Iraq feel better about their future then they did before the Saddam statues were toppled (yes, yes, by U.S. soldiers).

For those of us with a taste for historical irony, we've been reminded, thanks to the weblog *Jessica's Well* (jessicaswell.com), that the eminent novelist John Dos Passos toured post-World War II Europe and declared confidently in the January 7, 1946, issue of *Life*, "We have swept away Hitlerism, but a great many Europeans feel that the cure has been worse than the disease....Friend and foe alike, look at you accusingly in the face and tell you how bitterly they are disappointed in you as an American."

When it comes to Iraq, are war critics (I'm one) pulling a Dos Passos, whose story was breathlessly titled "Americans Are Losing the Victory in Europe"? Or is this really another Vietnam? (Exactly what that means is rarely clear.) Will Iraq be to us what Afghanistan was to the Soviets? Hell, is *Afghanistan*—a place that is routinely described as both trudging toward democracy and sliding back under the Taliban's heel—already becoming the quagmire it was for the Soviets?

Such epistemological conundrums are not limited to foreign policy. Especially in a presidential election year, domestic reality is up for grabs: The candidates want you to buy very different depictions of America. Is the economy still in the shitter? (And was it ever there, really, especially given levels of joblessness that were always below what used to be considered inevitable "frictional unemployment"?) Did President Bush's tax cuts (and/or unrestrained government spending) jump start the growth we may or may not be experiencing? Exactly how many jobs have been lost due to offshore outsourcing and how many to automation and other irrefutable signs of what used to be called progress?

This sort of social indeterminacy is not new, but it seems like it's becoming the defining characteristic of our contemporary moment, at least in politics. Surely it's telling that the first presidential election of the current era was a dead heat that could have plausibly gone either candidate's way. And as we slouch toward another such national contest this fall, surely it's meaningful that the most memorable election since Bush defeated Gore was Arnold Schwarzenegger's bizarre gubernatorial gambit in California.

Not only has Gov. Schwarzenegger starred in a memorable movie (*Total Recall*) based on a story by the great, insane writer Philip K. Dick, but Arnold's victory reads like a story by Dick, whose work is suffused with a sense of unreality, of never knowing whether you're awake or dreaming, seeing straight or hallucinating.

Halfway into the '00s—and barely into a new century—and nothing but big questions that require difficult answers. And more information than ever, none of which may make it any easier to draw the right conclusions. ●

Nick Gillespie (gillespie@reason.com) is editor-in-chief of reason.

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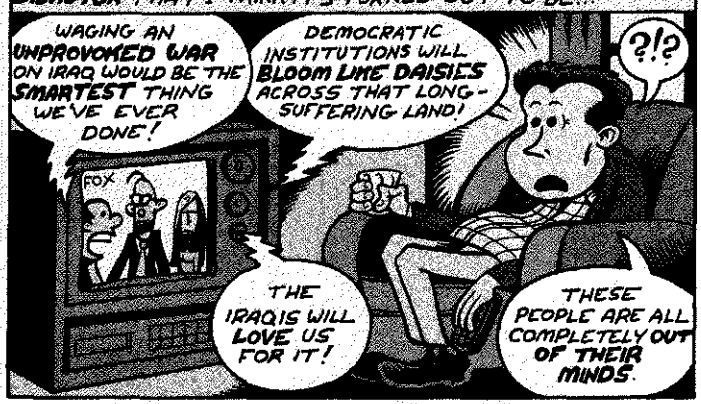
Peter Bagge

CONFESSIONS OF A LAZY ANTI-WARRIOR

PETERBAGGE@EARTHLINK.NET

18 MONTHS AGO EVERY BONE IN MY BODY WAS TELLING ME THAT A WAR IN IRAQ WOULD BE EVERY BIT THE **UNMITIGATED DISASTER** THAT I THINK IT'S TURNED OUT TO BE...


WAGING AN UNPROVOKED WAR ON IRAQ WOULD BE THE SMARTEST THING WE'VE EVER DONE!
DEMOCRATIC INSTITUTIONS WILL BLOOM LIKE DAISIES ACROSS THAT LONG-SUFFERING LAND!
?!?
FOX
THE IRAQIS WILL LOVE US FOR IT!
THESE PEOPLE ARE ALL COMPLETELY OUT OF THEIR MINDS.

YET RATHER THAN BOASTING "I TOLD YOU SO," I FEEL A **DEEP SENSE OF SHAME** FOR NOT DOING MORE TO HELP PREVENT IT FROM **HAPPENING**...

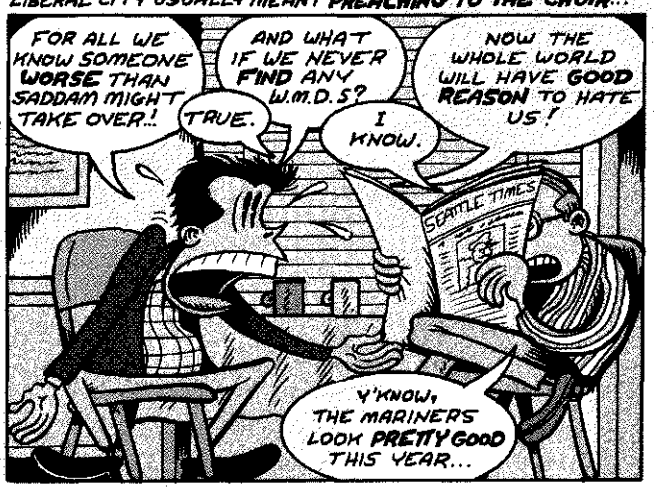
I SHOULD WRITE TO MY CONGRESSMAN TO EXPRESS MY OUTRAGE...
WAIT, HE'S ALREADY OPPOSED TO THE WAR...
GUESS I'LL WATCH THIS SIX-HOUR "LAW + ORDER" MARATHON INSTEAD...
=SIGH.=
=DOINK! DOINK!=

MY ONE CONTRIBUTION TO THE ANTI-WAR EFFORT WAS A FEATURE FOR THIS VERY MAGAZINE, IN WHICH I MAINLY MADE FUN OF **OTHER** WAR PROTESTERS!

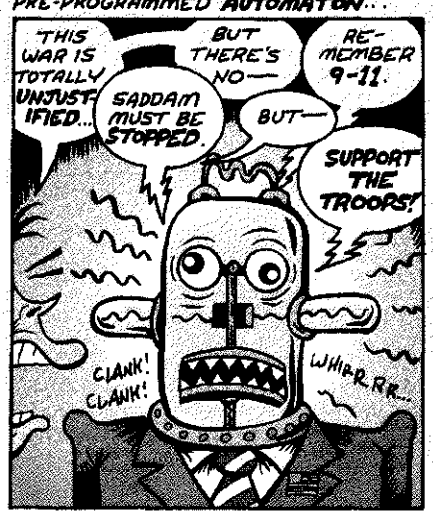
WAR IS THE NATURAL BY-PRODUCT OF CAPITALISM!
NO IT ISN'T!
THINK OF THE WOMEN AND CHILDREN!
WHY? ARE THE MEN ALL EXPENDABLE?
LET'S HOLD A SILENT VIGIL...
LET'S NOT!

I KNEW AT THE TIME THAT I WAS BEING COUNTERPRODUCTIVE, BUT I COULDN'T HELP MYSELF. I **COULDN'T STAND** THOSE PEOPLE!

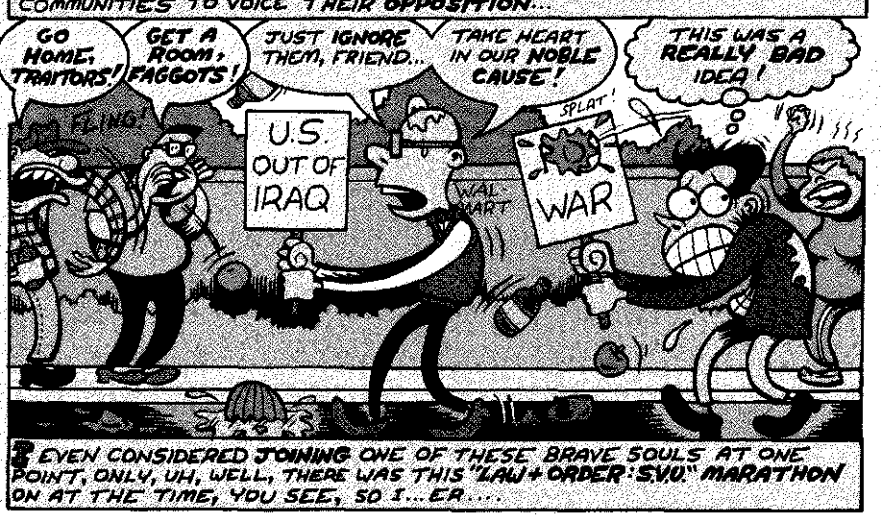
OPERATING ON A PERSONAL LEVEL ALSO SERVED LITTLE PURPOSE, SINCE BEING AN ARTIST (OF SORTS) LIVING IN A LIBERAL CITY USUALLY MEANT **PREACHING TO THE CHOIR**...


FOR ALL WE KNOW SOMEONE WORSE THAN SADDAM MIGHT TAKE OVER...!
AND WHAT IF WE NEVER FIND ANY W.M.D.S?
NOW THE WHOLE WORLD WILL HAVE GOOD REASON TO HATE US!
TRUE.
I KNOW.
SEATTLE TIMES
Y'KNOW, THE MARINERS LOOK PRETTY GOOD THIS YEAR...

MEANWHILE, TALKING TO WAR **SUPPORTERS** AT THAT TIME WAS LIKE TALKING TO A PRE-PROGRAMMED **AUTOMATON**...



THE FOLKS I **TRULY** ADMIRED WERE THE ONES WHO RISKED BEING **TARRED AND FEATHERED** BY MARCHING ALONE THROUGH RURAL, CONSERVATIVE COMMUNITIES TO VOICE THEIR **OPPOSITION**...



I EVEN CONSIDERED **JOINING** ONE OF THESE BRAVE SOULS AT ONE POINT, ONLY, UH, WELL, THERE WAS THIS "**LAW + ORDER: SVU**" MARATHON ON AT THE TIME, YOU SEE, SO I...ER...

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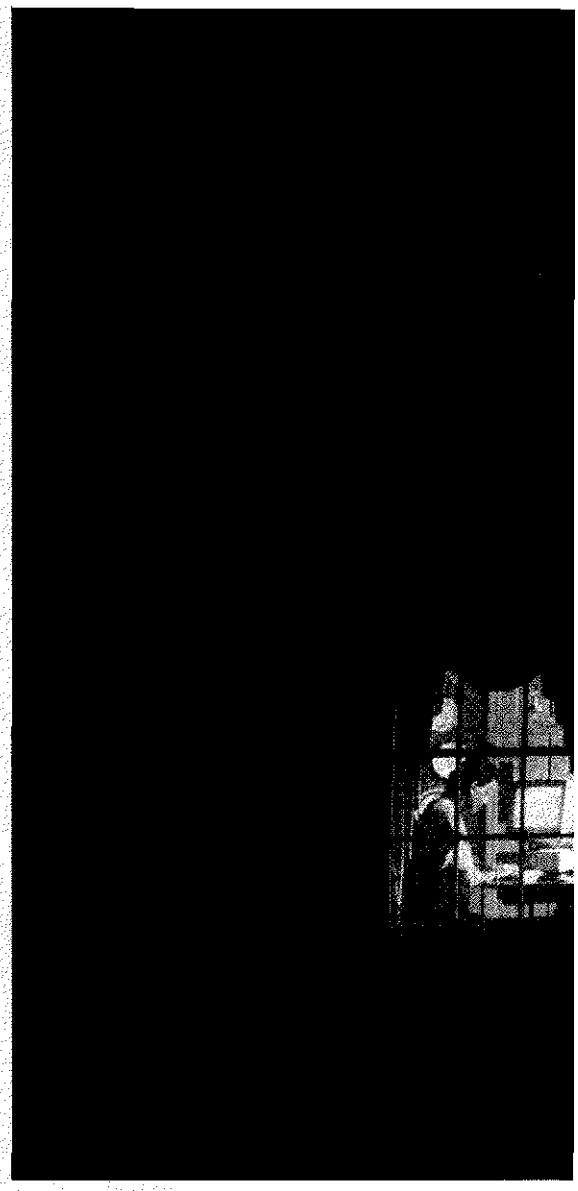
Database Nation

The upside of "zero privacy"

Declan McCullagh



IF YOU HAVEN'T noticed it already, flip back a few pages and take a good look at the front cover. Unless you picked this magazine up on a newsstand, you should see your neighborhood's grinning mug shot, exposed in all its glory from above. Depending on where you live, you may be able to glimpse your neighbors' homes, a gas station or two, and perhaps the local elementary school.

Welcome to the database nation, where the tiny chunk of data that represents your physical address can pull up an overhead view and driving directions to your front door. And that's not all. When your address is linked to databases like those used by Yahoo! People Search, your phone number may be readily accessible. Your county government's Web site probably displays your home's floor plan and assessed value, letting nosy neighbors chuckle over Alice's quaint split-level or Bob's lack of elbow room when the in-laws visit. Pay-as-you-go databases like Lexis-Nexis' P-TRAK, P-FIND, and P-SEEK tie together mortgage records, vehicle registrations, court judgments, bankruptcy histories, and any other public information they can gather. Google and Yahoo! can record every search you've ever made and link it to whatever computer you used at the time. Credit card companies know what you buy, frequent shopper programs know what you eat, and your insurance company knows what medical procedures you've undergone.

Is it any wonder that public concern about privacy has risen dramatically during the last decade? Self-help and advocacy books abound, with titles like *I Love the Internet But I Want My Privacy Too!* and *Privacy for Sale: How Big Brother and Others Are Selling Your Private Secrets for Profit.* Hundreds of privacy-related bills have been proposed in the U.S. Congress and state legislatures. In a February 2003 Harris poll, 69 percent of those surveyed agreed that "consumers have lost all control over how personal information is collected and used by companies." That view was summed up with cynical certitude by Sun Microsystems CEO Scott McNealy. "You have zero privacy anyway," he said a few years ago. "Get over it."

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What McNealy didn't mention, and polls and politicians don't recognize, is the unsung benefits that have accompanied the databasification of American society. More precisely, they're unacknowledged or invisible benefits. It's easy to complain about a subjective loss of privacy. It's more difficult to appreciate how information swapping accelerates economic activity. Like many other aspects of modern society, benefits are dispersed, amounting to a penny saved here or a dollar discounted there. But those sums add up quickly.

Markets function more efficiently when it costs little to identify and deliver the right product to the right consumer at the right time. Data collection and information sharing emerged not through chance but because they bring lower prices and more choices for consumers. The ability to identify customers who are not likely to pay their bills lets stores offer better deals to those people who will. In films like *The Net* and *Changing Lanes*, Hollywood tells us that databases

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can be very dangerous. The truth is more complex. Being a citizen of a database nation, it turns out, can be very good for you.

Mistreat Me, Please

When Safeway or Giant offers you a supermarket discount card, it's not because their executives are making value judgments about whether it's appropriate for you to nosh on mocha fudge ice cream instead of wheatgerm–infused organic macrobiotica. They don't care. Instead, supermarket managers use the cards to evaluate the effects of promotional campaigns, understand the impact of price on consumer demand, and make better predictions about what you might be looking for on your next shopping trip. IBM even sells grocers software to "quickly roll out a loyalty program designed to reward and retain your best customers and track shopping patterns." Technological innovations are crucial in the cutthroat supermarket business, where profit margins hover around 2 percent and sales at rival superstores like Wal-Mart and BJ's Wholesale Club have been increasing by 19 percent a year. Far from a means to snoop on customers, discount cards are more like a way for supermarket chains simply to survive.

Some vocal activists don't see it that way. A group called Consumers Against Supermarket Privacy Invasion and Numbering (CASPIAN) has sprung up for the sole purpose of condemning supermarket discount cards. "We've got to stop supermarkets from manipulating us into surrendering one of our most intimate possessions—the ability to make reasoned, non-coercive decisions about how and to whom to disclose intimate information about ourselves," CASPIAN warns. "How can supermarkets justify this vicious mistreatment of the very patrons who keep them in business?" Simple: Nobody is forcing shoppers to sign up for discount cards; they do it because the benefits outweigh the costs.

The implications of living in a database-driven society go far beyond supermarket cards. Consider Gateway, which in 1997 was looking for a way to boost Internet purchases of its computers. It decided to offer would-be purchasers a way to obtain instant credit through its Web site. By filling out an online form, customers could apply for immediate financing and, in nearly all cases, receive an answer in just 15 seconds.

The idea proved to be a terrific success. By providing instant credit, Gateway was able to attract customers who didn't have credit cards or didn't want to use them. Its previous, manual method of approving loans took an average of five hours and resulted in $377 million a year in consumer financing. After Gateway offered instant credit, sales picked up and financing ballooned to more than $2 billion by 1999.

Gateway was able to do that by taking advantage of one of the marvels of modern American society: the credit reporting system. Every day this system churns through millions of transactions relating to approximately 1.5 billion credit accounts held by 190 million people, each with his or her own FICO (Fair Isaac Corporation) score, a rough estimate of how credit-worthy that person is. This constant flow of information lets businesses and lenders make more accurate —that is, less risky—decisions about whether to grant or withhold credit. Thanks to this system, you can log on to Gateway.com and have a custom-built computer immediately shipped to you; you can apply for a mortgage at ditech.com, Moneywarehouse.com, or LendingTree.com and receive an instant answer. Go to a shopping mall, and you'll find that nearly every store seems to be pitching its own brand of credit card. You can visit a car dealer you've never been to before, obtain a five-figure loan, and drive your new purchase home the same day. In 1999 credit cards were used in the U.S. for 14 billion transactions totaling about $1.1 trillion, with an average purchase of $76, according to the U.S. Department of Commerce.

This incredible convenience is something our grandparents never enjoyed. Just a few decades ago, applying for credit meant an in-person visit to a loan officer. If the loan officer didn't know you personally, he or she would contact your references and other creditors and eventually make a decision a few weeks later. If you had just moved to the community, you might be turned down or be approved for only a small loan. It was a slow, painful process that was hardly consumer-friendly.

Today, not only can you get a loan nearly instantly; you'll pay less for it than in countries that prevent the free flow of information. Some nations permit only negative information in credit reports, instead of the mix of positive and negative details that form the backbone of the U.S. system. Walter Kitchenman, an econo-

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Data collection and information sharing emerged not through chance but because they bring lower prices and more choices for consumers. The ability to identify customers who are not likely to pay their bills lets stores offer better deals to those people who will.

mist at Purchase Street Research, estimates that because of information sharing among financial firms "mortgage rates in the United States are as much as two full percentage points lower" than they would be otherwise. In the words of Fred Cate, a law professor at Indiana University, "with outstanding mortgage rates approaching $4 trillion, American consumers save as much as $80 billion a year because of the efficiency and liquidity that information makes possible. The cost of credit in the United States is also lower [than in most places in the world] because the information that credit decisions depend on is assembled routinely and efficiently, rather than at the time the consumer desires credit." That's a few hundred dollars per American every year.

Most of us know people who misuse their credit cards through holiday spending sprees or random acts of profligacy. But millions of us do not; we use credit cards because they're safer and more convenient than carrying thick wads of dollar bills. Cash is dirty and carries germs. It can be ripped or torn accidentally. Unlike a credit card, if you lose it, you're out of luck.

Also, few of us can buy our homes outright. By giving us a schedule of regular payments, a bank loan to buy our home lets us plan for the future.

Building on Reputation

All this was made possible by the convergence of several trends half a century ago. After the Depression, the pent-up demand for consumer goods exploded and the desire for an entirely cash-based society evaporated. The end of World War II brought a population boom and greater mobility. The most crucial change was the invention of the computer, which permitted more-efficient information storage and retrieval. The invention of high-capacity hard drives, fatter memory chips, and ever-speedier integrated circuits completed the databasification of American life.

While computers were essential to this latest phase of data gathering, the need to compile and exchange financial information is hardly new. Stanford economist Avner Greif's history of trade between 11th-century Mediterranean cities, published in the *Journal of Economic History* in 1989, showed how merchants used overseas agents, backed up by a web of information flows, to save money. For merchants, hiring agents to receive shipments when they arrived at the destination port was cheaper than traveling with the goods. To prevent agents from absconding with the merchandise, Maghrebi traders relied on a social network that provided agents and kept track of those who cheated. "Information was crucial to business decision-making," Greif noted. To keep agents honest, "coalition members blocked a cheater's access to the coalition's internal information flows." The traders' rudimentary paper ledgers served the same purpose as today's electronic credit reports: helping to distinguish honorable traders from frauds and deadbeats.

Adam Smith came to a similar conclusion in a 1766 paper titled "Lecture on the Influence of Commerce on Manners." He stressed the importance of a positive reputation, which necessarily means that others have access to information about your past actions and therefore feel they can predict your future behavior. "A dealer is afraid of losing his character, and is scrupulous in observing every engagement," Smith wrote. "When a person makes perhaps 20 contracts in a day, he cannot gain so much by endeavoring to impose on his neighbors, as the very appearance of a cheat would make him lose."

Modern databases trace the reputations not just of individuals but of corporations as well. Probably the most

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Few of us are fans of direct marketing—until we receive an advertisement for a product we want. The same information sharing that makes unwanted solicitations possible also can improve targeting so that consumers receive offers that interest them.

famous example is the credit reporting firm Dun & Bradstreet, which provides one of the most important tributaries to the pool of information about corporations and government agencies. It was founded as two different firms—New York's Mercantile Agency in 1841 and Cincinnati's Bradstreet Company in 1849—that merged in 1933. Both were created in response to a 19th-century problem: false letters of credit.

As American pioneers headed westward, scoundrels occasionally would present forged letters of credit to wholesale merchants in larger towns. After obtaining merchandise on credit, the person responsible for the scam would silently vanish with the goods. Dun & Bradstreet's crucial innovation was to make the system more efficient by compiling credit information on traders and retailers into voluminous leather-bound tomes. Those were available for perusal at branch offices that moved west along with new cities as they became populated. Dun & Bradstreet even employed traveling "reporters" who would investigate both new and established businesses and make recommendations about their creditworthiness. (Ulysses S. Grant and William McKinley were once Dun & Bradstreet correspondents.)

Daniel Klein, an economist at Santa Clara University who studies reputation, says such systems arise because "trust has an important role in just about all dealings. Trust depends on confidence which depends on assurance. Information is one form of that."

Secret Weapon

Having a portion of your existence chronicled in a web of interlinked databases does raise some legitimate privacy concerns. Who has access? How long will your credit card purchases remain on file? Getting cheap mortgage quotes is fine, but what is in place to protect against misuse of the information?

In the U.S., there is no catch-all law that dictates who may access which information under what circumstances. Instead, a mesh of state, federal, and common law applies to different parts of the economy. Most important, information exchange in the private sector is regulated by contract law, and firms that break their promises can pay a price.

Last year JetBlue secretly gave personal information on some 5 million passengers to a private contractor, Torch Concepts of Huntsville, Alabama, that is working on a data mining project for the Bush administration. A presentation prepared by Torch Concepts describes how it merged the JetBlue database with U.S. Social Security numbers, home addresses, income levels, and vehicle ownership information it purchased elsewhere. Now JetBlue is facing lawsuits over the apparent breach of its privacy policy, which assured its Web customers that "financial and personal information collected on this site is not shared with any third parties."

The U.S. Department of Commerce summed up the issue with unusual succinctness in a 2000 letter to the European Commission: "The right to recover damages for invasion of personal privacy is well established under U.S. common law." Courts have found privacy violations when an insurance company used information about an actual accident in an advertising campaign, when an employer tried to snoop through workers' credit card records to verify sick day absences, and when a college tested students for HIV without their knowledge. In 2001 Amazon.com's Alexa subsidiary agreed to pay up to $1.9 million to settle a class action lawsuit alleging that Alexa

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was giving information to Amazon without customers' permission.

Not content with existing rules, privacy activists have been pressing for more regulations targeting U.S. businesses. Their recent successes include the 1999 Financial Services Modernization Act, better known as Gramm-Leach-Bliley, which regulates the data collection practices of financial services firms. The law has resulted in millions of disclosure statements mailed to consumers, who routinely ignore them. Then there's the Health Insurance Portability and Accountability Act of 1996, which regulates medical care providers. Credit bureaus are covered by the Fair Credit Reporting Act.

More efficient and less burdensome are the state laws known as privacy torts. Those punish snoops who pry into someone else's private affairs, anyone who publicly discloses embarrassing private facts, and publicity that shows someone in a false light. Jim Harper, a former Capitol Hill staffer who runs the advocacy site Privacilla.org, says left-leaning privacy advocates have willfully ignored state privacy torts when arguing for more-intrusive regulations. "Privacy advocates and others have helped to foster the impression that there is no law protecting Americans," Harper says. "This is a violation of the trust that many have placed with them. Substantial criticisms of the privacy torts can be made, but they should be made directly, rather than by telling the press, the public, and public officials that no privacy-protecting law exists in the United States."

In addition to ignoring existing protections, privacy advocates usually do not acknowledge the downside to impeding the flow of information. As Klein, the Santa Clara economist, observes, "There is a collision between privacy and social accountability mechanisms generally. You see this real clearly in social accountability mechanisms like the press, courtroom, or gossip. There the violations of privacy are so much worse than in credit reporting. They're more invasive, less reliable, less discreet. The thing is, people don't appreciate the social accountability aspect of things like credit reporting."

The privacy torts usually are said to date back to an influential *Harvard Law Review* article written in 1890 by Samuel Warren and future Supreme Court Justice Louis Brandeis, titled "The Right to Privacy." They complained that journalists were being too aggressive and nosy: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life....For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer."

Permission to Speak Freely

What's shocking to modern eyes is the degree to which Warren and Brandeis wanted to muzzle the press, in a way that today would be viewed as an unacceptable violation of the First Amendment. Warren was miffed to find details of his personal life described in the society pages of the Boston newspapers—the 19th-century equivalent of *The National Enquirer* or the *New York Post*'s Page Six column. He and Brandeis complained: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers."

Warren and Brandeis's article brings into sharp relief the tension between privacy and free speech. In the 114 years since the essay was published, privacy has become a remarkably wiggly and fluid notion, encompassing the right to an abortion or contraception, the right to be free of telemarketers and Internet cookies, and the right to keep government goons out of your home.

A cornerstone of the American approach to information flows in the private sector is that in general they strongly favor free speech over privacy. With a few exceptions, the default assumption for data exchanges is an "opt-out" standard, under which information you provide to a company is theirs to use unless you say otherwise. Under an "opt-in" standard, by contrast, the data are to be kept private unless you explicitly give your permission. Defaults are important: Research from the Columbia Business School suggests that people tend not to change the options they have been presented.

The European Union has adopted a general opt-in rule aimed at damming the flow of information. Known as the European Data Directive, the European rule says personal

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information generally may not be "processed" without the subject's unambiguous consent.

As you might expect, the European rule has run head on into the law of unintended consequences, and the results have hurt activists as well as consumers. Jacob Palme, a professor of computer science at Stockholm University, has documented how Sweden's implementation of the European directive has imperiled free speech. Swedish regulators prevented American Airlines from transferring customer information from Europe to its SABRE reservation system in the United States. Regulators prosecuted an animal rights activist who published a list of fur producers and a consumer activist who criticized a large bank on a Web page that named the bank's directors. "Looking at the way the law is used," Palme concludes, "one can see that unpopular or controversial opinions are suppressed."

Nevertheless, at the prodding of pro-regulation privacy activists, the U.S. has veered in the same direction in the last few years. "The question is, 'Is information being used in a way that has social utility?'" says Chris Hoofnagle, legislative counsel for the Electronic Privacy Information Center in Washington, D.C. "If it's simply done to profit-maximize, there are questions about whether consumers are really getting the benefit. We're searching for a framework of protections very similar to the E.U. privacy directive that regulates the collection and use of information across all contexts rather than the piecemeal approach we currently have."

By guaranteeing freedom of speech, the First Amendment to the U.S. Constitution poses an obstacle to laws that interfere with the free flow of information. The U.S. Supreme Court has struck down some ordinances that required opt-in consent, including a law enacted by the city of Struthers, Ohio, that banned uninvited door-to-door solicitations and a federal law that required affirmative consent from recipients of communist propaganda.

Optional Costs

Constitutional questions aside, how would an opt-in rule work? Consider how it would affect the MBNA Corporation, a financial services company that became a multibillion-dollar success story not long after it was incorporated in 1981. MBNA grew to more than 51 million customers through its aggressive "affinity" program, which let a number of groups—NASCAR, universities, the Atlanta Braves, and so on—market credit cards imprinted with their own logos. Not counting its existing customers, in 2000 MBNA had a database of 800 million names of prospective cardholders provided by affinity groups, but it could afford to send only 400 million solicitations.

Writing in the *Duke Law Journal* in February 2003, Indiana law professor Fred Cate and Georgetown business professor Michael Staten described how MBNA winnowed its list down to an affordable size through aggressive information sharing. MBNA first looked at public records and then, by exchanging information with its affiliates, tried to evaluate the creditworthiness of the remaining names on the list. The remaining 400 million people received solicitations with the endorsement of the affinity group to which they belonged.

Staten and Cate's conclusion: "Mandatory opt-in requirements on MBNA's operations would impair MBNA's affinity group business model, raise account acquisition costs and lower profits, reduce the supply of credit and raise credit card prices, generate more offers to uninterested or unqualified consumers and raise the number of missed opportunities for qualified consumers, and impair efforts to prevent fraud and identity theft." Under an opt-in rule, recipients of the offers would "be more risky and less profitable than MBNA's target group reached under the current rules. As a result, MBNA's delinquency and charge-off rates will rise, relative to its current experience, thereby imposing additional costs that will be passed along to all of MBNA's customers."

MBNA's experience highlights how data exchanges fuel the economic engine of an information society. Choking a society's data flow by setting the default rule to "no" restricts that fuel. An opt-in regime suffocates the economic activity that takes place when businesses use personal information to offer new products and tell customers about them without obtaining explicit permission in advance. Because it assumes customers who have expressed no preference would object to a solicitation, it is more expensive than an opt-out approach.

"Suppose you're a financial company and you have an idea," says Solveig Singleton, a lawyer at the pro-market Competitive Enterprise Institute in Washington, D.C. "Say you'd like to offer a mortgage for first-time home buyers.

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If you don't like Safeway's discount card, don't get it. That choice disappears when the government demands data. Governments have the unique—and uniquely dangerous—ability to compel you to divulge information whether you want to or not.

You design a flyer and look at your expenses and realize it would be pretty expensive to send it to everyone. Instead, you want to get some information to lower your costs and [target just a subset]. If you don't have that information, the costs of identifying your potential customer base are so high you don't offer the product at all."

In 1997 Qwest Communications performed a practical study of the opt-in rule. It asked its customers for permission to use general information about their calling habits to market new services to them. When customers were asked for this permission through postal mail, the positive response rate was between 5 percent and 11 percent. When Qwest representatives made phone calls instead, the response rate was up to six times higher—an indication that many customers really didn't mind but also didn't want to go through the bother of sending a letter to opt in. Qwest eventually concluded that an opt-in approach was too expensive to be viable.

If we want the low prices and consumer choices of a database nation, we may have to tolerate unsolicited sales pitches (although there are ways to avoid them—all legitimate marketers offer a way to delete your name from the list). Few of us are fans of direct marketing—until we receive an advertisement for a product we want. The same information sharing that makes unwanted solicitations possible also can improve targeting so that consumers are more likely to receive offers that interest them. And many people clearly do: The Direct Marketing Association's 2002 annual report estimated that direct marketing efforts "are projected to generate nearly $2 trillion in sales" in 2003. Even if that number is inflated, information flows contribute to a huge chunk of the economy.

"Companies are increasingly finding that if consumer data is not readily available for business use, the negative impact on sales could severely stunt company growth," warns Jennifer Barrett, chief privacy officer at Acxiom, a database marketing firm in Little Rock, Arkansas. "Moreover, increased marketing costs could force retailers to substantially raise the price of their merchandise to maintain effective margins. The result would be higher prices, fewer customers, and fewer jobs."

Site Security

The cost of restricting information hasn't stopped regulatory enthusiasts from demanding an opt-in standard for Web sites. Federal law mandates that standard for medical information, and pro-regulation activists hope to broaden the concept to stretch as far as the European Data Directive does.

Congress has convened dozens of hearings on Internet privacy issues, and in April 2002 Sen. Ernest Hollings (D-S.C.) introduced his Online Personal Privacy Act. The now-defunct bill would have regulated how Internet service providers, commercial Web sites, and noncommercial sites supported by advertising or product sales collect information about customers. The legislation covered "personally identifiable information," including names, e-mail addresses, and numeric I.P. addresses.

"How can we trust companies with our personal information when their every economic incentive is to collect, compile, enhance, target, and disseminate it for profit?" Hollings said in support of the bill. "It is like letting the fox guard the henhouse. Our bill grants consumers, not companies, control over their personal information on the Internet. And our opt-in component is the only method for ensuring that Internet users have the ultimate control."

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Focusing on government power would keep intact the advantages of databasification—such as lower prices and cheaper mortgages—while limiting possible abuses by law enforcement. We should retain the benefits of living in a database nation while preventing it from devolving into a police state.

Hollings' proposal had a technophobic twist: It applied only to the customer records of Internet-related firms, not their brick-and-mortar competitors. During one Senate hearing, an Amazon.com lobbyist pointed out the discrepancy and unfair advantage. Hewlett-Packard predicted that the vague definitions in Hollings' bill would invite lawsuits.

Some politicians have gone even further than Hollings. The Consumer Internet Privacy Protection Act, proposed by the late Rep. Bruce Vento (D-Minn.) in 1997, would have barred Web sites from sharing "personally identifiable information" about their visitors without prior "written consent"—a requirement far more onerous than the one that applies to offline firms. Other, more recent proposals include a plan being advanced in the Senate by Dianne Feinstein (D.-Calif.) to slap serious restrictions on all forms of database marketing.

Robert Hahn of the American Enterprise Institute estimates that complying with an opt-in requirement for Web sites would incur a one-time cost of between $9 billion and $36 billion. If Hahn's numbers are anywhere near correct, struggling companies could be required to lay off workers, and marginal ones could be driven to bankruptcy.

With the exception of sites targeted at young children, which are federally regulated, under current law Web sites choose their own privacy policies and are judged accordingly. Consumers can rely on nongovernmental rating and reputation systems to steer them toward desirable destinations. Just as *The Michelin Guide* reviews restaurants and kashrut organizations certify foods, these systems rate privacy. TRUSTe, BBBonline, and WebTrust offer "privacy seals" to Web sites so consumers can find companies worthy of their trust. To earn a TRUSTe seal, a firm signs a contract that requires its site to prominently disclose how it collects, uses, and distributes personally identifiable information about its users. The cost ranges between $300 and $7,000 a year, depending upon the company's size, and participating companies can display a bright green TRUSTe logo. TRUSTe claims 2,000 member companies, including many high-profile sites, and BBBonline has awarded its privacy seal to more than 500 sites.

In addition to these companies, nearly all large commercial Web sites take a full-disclosure approach to privacy, saying exactly what they'll do with personal data they collect. Although Europe has strict regulations in this area, America's free market approach seems more effective. A 2001 report from Consumers International, a global association of more than 260 pro-regulation groups, admits that "despite tight EU regulation, sites within the EU are no better at telling users how they use their data than sites based in the U.S. Indeed, some of the best privacy policies were found on U.S. sites."

Ways of Making Us Talk

An approach to data handling that works for businesses trying to woo customers, of course, may not be appropriate for governments trying to monitor their citizens. When dealing with private corporations, you generally can choose whether to give them your information. If you don't like Safeway's discount card, don't get it; or shop at Whole Foods, which doesn't offer one. If Amazon.com's recommendations are annoying, try barnesandnoble.com instead. You have a choice.

That choice disappears when the government demands data. Whether you're filing tax returns or filling out a form for a driver's license, governments have the unique—and uniquely

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dangerous—ability to compel you to divulge information whether you want to or not. Police also have the unique power to conduct wiretaps, set up roadblocks, and employ search warrants. The massive Total Information Awareness project that John Poindexter tried to piece together under the aegis of the Defense Department would have put private-sector databases to shame. The Treasury Department's FinCEN agency, available to local, state, and federal police, offers the ability to scroll through more than 120 million reports about banking transactions. The FBI, the Secret Service, and the U.S. Bureau of Customs and Border Protection regularly download the data and import it into their own databases. (See "Show Us Your Money," November 2003.) In addition to unique data collection abilities, the government has unique powers in using the information it gathers, including the ability to arrest, prosecute, fine, and imprison people.

To curb these awesome powers, the usual response has been to place specific limits on what government agencies can do. The Fourth Amendment to the U.S. Constitution and laws such as the Privacy Act of 1974 restrict searches and information collection by the government. State constitutions also have long restricted government data collection.

In today's world, halfway measures like the Privacy Act don't go far enough to restrict government abuses. Enacted largely as a result of a federal report on automated data systems, the Privacy Act covers any government-operated "system of records" with personal information on American citizens. It limits the use and disclosure of those records and requires that the databases be protected with "appropriate administrative, technical and physical safeguards" to preserve their security and confidentiality. But Congress could never have envisioned the tremendous outsourcing of databases that has taken place during the last three decades. More and more, the private sector stores information on the feds' behalf and the information in outsourced databases is not covered by the Privacy Act.

Other loopholes exist. Image Data signed a contract with the Secret Service in 1997 to create a national identity database for the federal government. Documents obtained through the Freedom of Information Act show that the Immigration and Naturalization Service, now part of the U.S. Department of Homeland Security, queried private-sector databases 20,000 times a month over the last few years. In fiscal year 2002, the U.S. Department of Justice inked an $11 million contract for access to databases held by ChoicePoint—a self-described "leading provider of identification and credential verification services for business and government"—including Americans' names, addresses, previous addresses, places of employment, spouses' names, and Social Security numbers. The FBI now insists, improbably, that the bureau's arrangement with ChoicePoint is so secret that even the contract number may not be disclosed.

Databasification, in other words, does have a dark side: increasing government access to private collections of information. Some privacy activists cite this cooperation as a reason to regulate private databases, which makes as much sense as preventing companies from manufacturing binoculars simply because police can use them for unlawful surveillance. The more sensible approach is to restrict the power of the police to snoop in the first place. That means taking steps such as updating the Privacy Act of 1974 to limit government access to outsourced databases; increasing the authority of inspectors general at federal agencies to monitor data abuses; boosting criminal penalties for lawbreaking cops; requiring police to meet higher standards of proof before perusing databases; and, most important, rethinking the drug laws that invite snooping into Americans' personal lives. (About 78 percent of domestic wiretaps conducted with court oversight in 2002 were for drug offenses. Investigations of violent crimes such as murder, kidnapping, and extortion accounted for just 6 percent.)

Focusing on government power would keep intact the undeniable advantages of databasification—lower prices, cheaper mortgages, and more-efficient uses of information—while limiting possible abuses by law enforcement. The aim should be to retain the tremendous benefits of living in a database nation while preventing it from devolving into a police state. ▮

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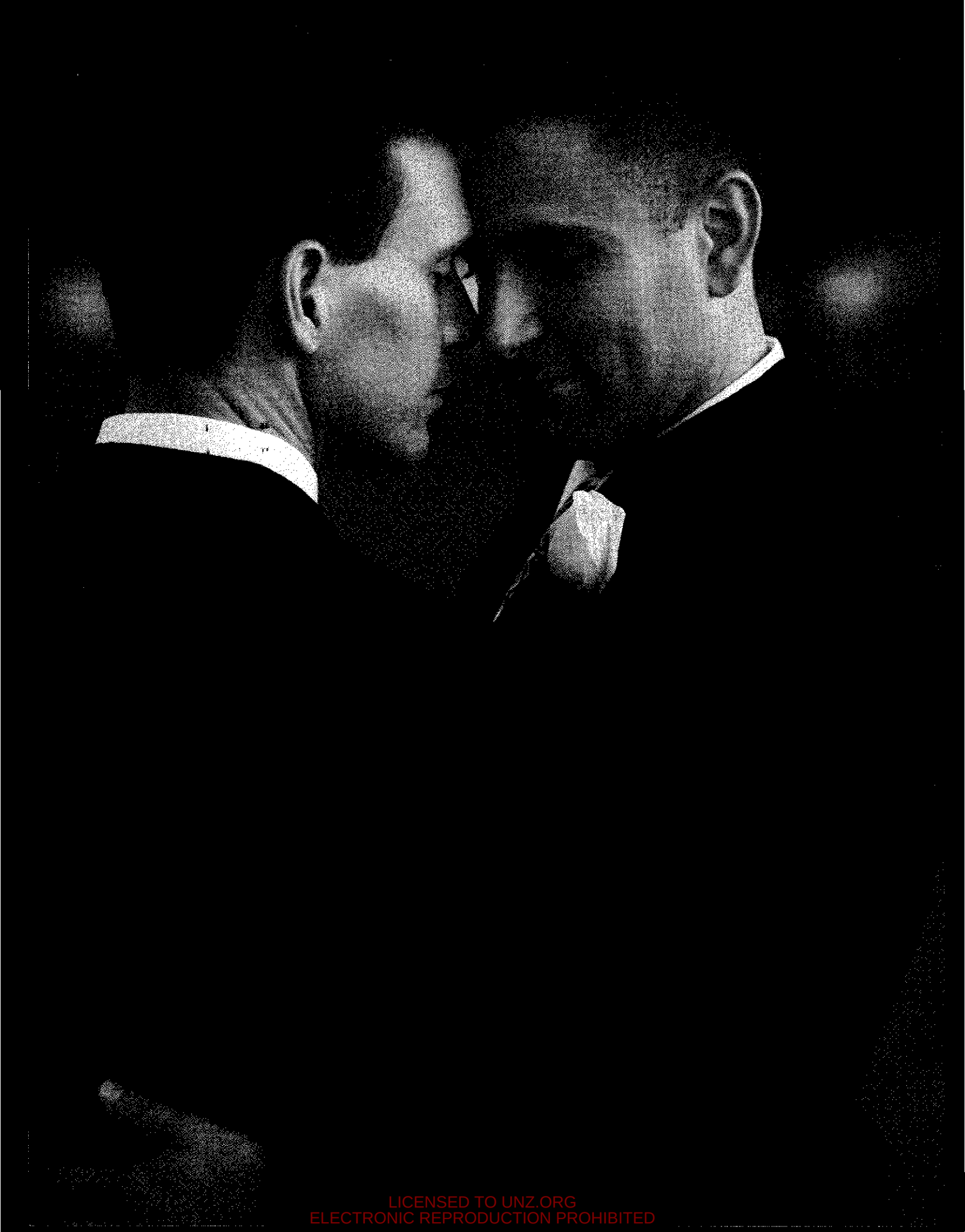

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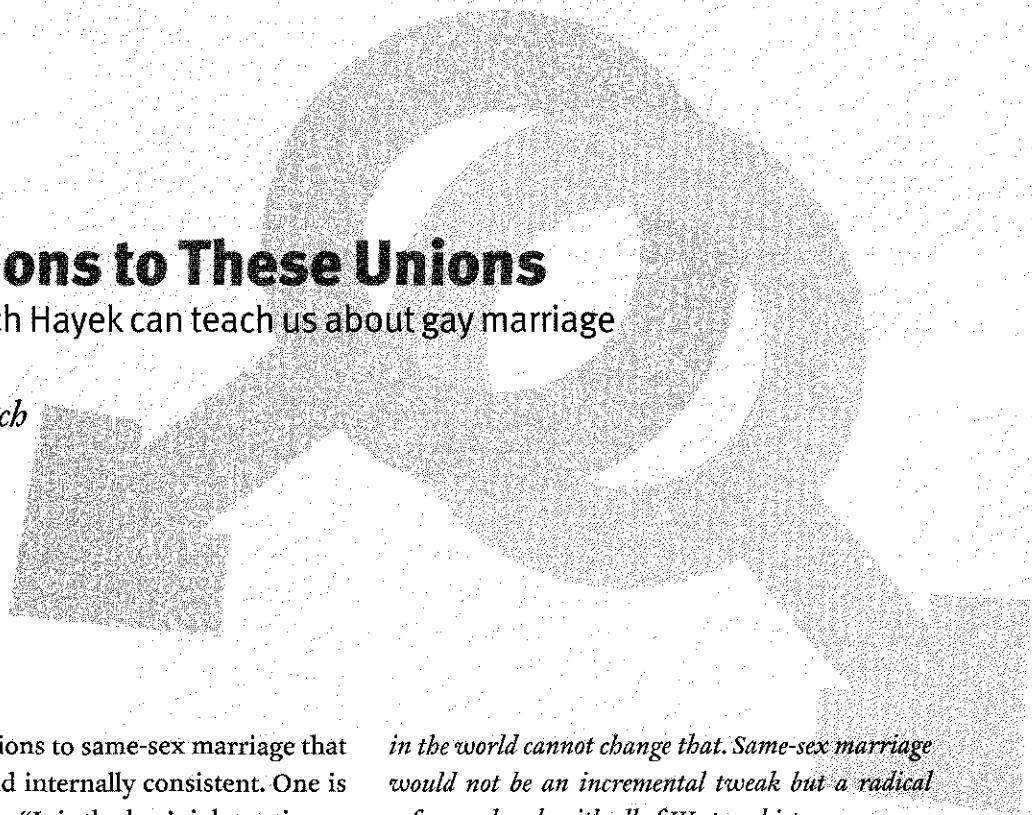
Objections to These Unions

What Friedrich Hayek can teach us about gay marriage

Jonathan Rauch



THERE ARE ONLY two objections to same-sex marriage that are intellectually honest and internally consistent. One is the simple anti-gay position: "It is the law's job to stigmatize and disadvantage homosexuals, and the marriage ban is a means to that end." The other is the argument from tradition—which turns out, on inspection, not to be so simple.

Many Americans may agree that there are plausible, even compelling, reasons to allow same-sex marriage, and that many of the objections to such unions are overwrought, unfair, or misguided. And yet they draw back. They have reservations that are hard to pin down but that seem not a whit less powerful for that. They may cite religion or culture, but the roots of their misgivings go even deeper. Press them, and they might say something like this:

I understand how hard it must be to live a marriageless life, or at least I try to understand. I see that some of the objections to same-sex marriage are more about excluding gays than about defending marriage. Believe me, I am no homophobe; I want gay people to have joy and comfort. I respect their relationships and their love, even if they are not what I would want for myself.

But look. No matter how I come at this question, I keep bumping into the same wall. For the entire history of civilization, marriage has been between men and women. In every religion, every culture, every society—maybe with some minor and rare exceptions, none of them part of our own heritage—marriage has been reserved for the union of male and female. All the words in the world cannot change that. Same-sex marriage would not be an incremental tweak but a radical reform, a break with all of Western history.

I'm sorry. I am not prepared to take that step, not when we are talking about civilization's bedrock institution. I don't know that I can even give you good reasons. It is just that what you are asking for is too much.

Perhaps it doesn't matter what marriage is for, or perhaps we can't know exactly what marriage is for. Perhaps it is enough simply to say that marriage is as it is, and you can't just make it something else. I call this the Hayekian argument, for Friedrich August von Hayek, one of the 20th century's great economists and philosophers.

Hayek the Conservative?

Hayek—Austrian by birth, British by adoption, winner of the 1974 Nobel Memorial Prize in Economic Sciences—is generally known as one of the leading theoreticians of free market economics and, more broadly, of libertarian (he always said "liberal") social thought. He was eloquent in his defense of the dynamic change that markets bring, but many people are less aware of a deeply traditionalist, conservative strand in his thinking, a strand that traces its lineage back

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at least to Edmund Burke, the 18th-century English philosopher and politician. Burke famously poured scorn on the French Revolution and its claims to be inventing a new and enlightened social order. The attempt to reinvent society on abstract principles would result not in utopia, he contended, but in tyranny. For Burke, the existing order might be flawed, even in some respects evil, but it had an organic sense to it; throwing the whole system out the window would bring greater flaws and larger evils.

Outside Britain and America, few people listened. The French Revolution inspired generations of reformers to propose their own utopian social experiments. Communism was one such, fascism another; today, radical Islamism (the political philosophy, not the religion) is yet one more. "The attempt to make heaven on earth invariably produces hell," wrote Karl Popper, another great Austrian-British philosopher, in 1945, when the totalitarian night looked darkest. He and Hayek came of age in the same intellectual climate, when not only Marxists and fascists but many mainstream Western intellectuals took for granted that a handful of smart people could make better social decisions than could chaotic markets, blind traditions, or crude majorities.

It was in opposition to this "fatal conceit," as he called it, that Hayek organized much of his career. He vigorously argued the case for the dynamism and "spontaneous order" of free markets, but he asserted just as vigorously that the dynamism and freedom of constant change were possible only within a restraining framework of rules and customs and institutions that, for the most part, do not change, or change at a speed they themselves set. No expert or political leader can possibly have enough knowledge to get up every morning and order the world from scratch: decide whether to wear clothing, which side of the street to drive on, what counts as mine and what as yours. "Every man growing up in a given culture will find in himself rules, or may discover that he acts in accordance with rules—and will similarly recognize the actions of others as conforming or not conforming to various rules," Hayek wrote in *Law, Legislation, and Liberty.* The rules, he added, are not necessarily innate or unchangeable, but "they are part of a cultural heritage which is likely to be fairly constant, especially so long as they are not articulated in words and therefore also are not discussed or consciously examined."

Tradition Over Reason

Hayek the economist is famous for the insight that, in a market system, the prices generated by impersonal forces may not make sense from any one person's point of view, but they encode far more economic information than even the cleverest person or the most powerful computer could ever hope to organize. In a similar fashion, Hayek the social philosopher wrote that human societies' complicated web of culture, traditions, and institutions embodies far more cultural knowledge than any one person could master. Like prices, the customs generated by societies over time may seem irrational or arbitrary. But the very fact that these customs have evolved and survived to come down to us implies that a practical logic may be embedded in them that might not be apparent from even a sophisticated analysis. And the web of custom cannot be torn apart and reordered at will, because once its internal logic is violated it may fall apart.

It was on this point that Hayek was particularly outspoken: Intellectuals and visionaries who seek to deconstruct and rationally rebuild social traditions will produce not a better order but chaos. In his 1952 book *The Counter-Revolution of Science: Studies in the Abuse of Reason,* Hayek made a statement that demands to be quoted in full and read at least twice:

"It may indeed prove to be far the most difficult and not the least important task for human reason rationally to comprehend its own limitations. It is essential for the growth of reason that as individuals we should bow to forces and obey principles which we cannot hope fully to understand, yet on which the advance and even the preservation of civilization depends. Historically this has been achieved by the influence of the various religious creeds and by traditions and superstitions which made man submit to those forces by an appeal to his emotions rather than to his reason. The most dangerous stage in the growth of civilization may well be that in which man has come to regard all these beliefs as superstitions and refuses to accept or to submit to anything which he does not rationally understand. The rationalist whose reason is not sufficient to teach him those limitations of the powers of conscious reason, and who despises all the institutions and customs which have not been consciously designed, would thus become the destroyer of the civilization built upon them. This may well prove a hurdle

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which man will repeatedly reach, only to be thrown back into barbarism."

For secular intellectuals who are unhappy with the evolved framework of marriage and who are excluded from it—in other words, for people like me—the Hayekian argument is very challenging. The age-old stigmas attached to illegitimacy and out-of-wedlock pregnancy were crude and unfair to women and children. On the male side, shotgun marriages were coercive and intrusive and often made poor matches. The shame associated with divorce seemed to make no sense at all. But when modern societies abolished the stigmas on illegitimacy, divorce, and all the rest, whole portions of the social structure just caved in.

Not long ago I had dinner with a friend who is a devout Christian. He has a heart of gold, knows and likes gay people, and has warmed to the idea of civil unions. But when I asked him about gay marriage, he replied with a firm no. I asked if he imagined there was anything I could say that might budge him. He thought for a moment and then said no again. Why? Because, he said, male-female marriage is a sacrament from God. It predates the Constitution and every other law of man. We could not, in that sense, change it even if we wanted to. I asked if it might alter his conclusion to reflect that legal marriage is a secular institution, that the separation of church and state requires us to distinguish God's law from civil law, and that we must refrain from using law to impose one group's religious precepts on the rest of society. He shook his head. No, he said. This is bigger than that.

I felt he had not answered my argument. His God is not mine, and in a secular country, law can and should be influenced by religious teachings but must not enforce them. Yet in a deeper way, it was I who had not answered his argument. No doubt the government has the right to set the law of marriage without kowtowing to, say, the Vatican. But that does not make it wise for the government to disregard the centuries of tradition—of accumulated social knowledge—that the teachings of the world's great religions embody. None of those religions sanctions same-sex marriage.

My friend understood the church-state distinction perfectly well. He was saying there are traditions and traditions. Male-female marriage is one of the most hallowed. Whether you call it a sacrament from God or part of Western civilization's cultural DNA, you are saying essentially the same thing: that for many people a same-sex union, whatever else it may be, can never be a marriage, and that no judge or legislature can change this fact.

Here the advocates of same-sex marriage face peril coming from two directions. On the one side, the Hayekian argument warns of unintended and perhaps grave social consequences if, thinking we're smarter than our customs, we decide to rearrange the core elements of marriage. The current rules for marriage may not be the best ones, and they may even be unfair. But they are all we have, and you cannot re-engineer the formula without causing unforeseen results, possibly including the implosion of the institution itself. On the other side, political realism warns that we could do serious damage to the legitimacy of marital law if we rewrote it with disregard for what a large share of Americans recognize as marriage.

If some state passed a law allowing you to marry a Volkswagen, the result would be to make a joke of the law. Certainly legal gay marriage would not seem so silly, but people who found it offensive or illegitimate might just ignore it or, in effect, boycott it. Civil and social marriage would

Predictions of disaster if open homosexuals are integrated into traditionally straight institutions have a perfect track record: They are always wrong.

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fall out of step. That might not be the end of the world—the vast majority of marriages would be just as they were before—but it could not do marriage or the law any good either. In such an environment, same-sex marriage would offer little beyond legal arrangements that could be provided just as well through civil unions, and it would come at a price in diminished respect for the law.

Call those, then, the problem of unintended consequences and the problem of legitimacy. They are the toughest problems same-sex marriage has to contend with. But they are not intractable.

The Decoy of Traditional Marriage

The Hayekian position really comes in two quite different versions, one much more sweeping than the other. In its strong version, the Hayekian argument implies that no reforms of longstanding institutions or customs should ever be undertaken, because any legal or political meddling would interfere with the natural evolution of social mores. One would thus have had to say, a century and a half ago, that slavery should not be abolished, because it was customary in almost all human societies. More recently, one would have had to say that the federal government was wrong to step in and end racial segregation instead of letting it evolve at its own pace.

Obviously, neither Hayek nor any reputable follower of his would defend every cultural practice simply on the grounds that it must exist for a reason. Hayekians would point out that slavery violated a fundamental tenet of justice and was intolerably cruel. In calling for slavery's abolition, they would do what they must do to be human: They would establish a moral standpoint from which to judge social rules and reforms. They thus would acknowledge that

Loves Without Borders

What happens when gays from two different countries can't wed?

Ben Smith

One of the reasons we're supposed to care less about gay marriage than about black civil rights is that the stakes are so much lower today. Then it was about what might be called basic freedoms to live and work. Now it's about secondary rights such as inheritance and health care, things that can be addressed by contract law. As Sen. John Kerry (D-Mass.) said in a February presidential debate, at the center of the gay marriage debate is "terminology."

Tell that to David Kloss. In the summer of 2001, the 54-year-old oil exploration manager made a terrible mistake: He fell in love with a Canadian. Soon, he faced a choice shared by thousands of American citizens: Leave the man he loved, or leave the country.

The source of the dilemma is federal immigration law, which is based on the seemingly innocuous principle of "family reunification." Kloss' partner, Remi Collette, 35, moved to San Francisco to join him. But Collette was officially a tourist. He couldn't work legally, and he couldn't stay indefinitely. If Kloss and Collette had been a straight couple, they would have counted as a "family." Getting papers and eventually citizenship would have been a routine, bureaucratic process. As gays, they faced a stark choice: break the law with illegal work or a sham heterosexual marriage, or join the diaspora of self-described "love exiles."

"You go through life, you think you're American, you think you're in the land of the free," Kloss says. "Then suddenly I come to a situation where Remi couldn't stay, and my country says you either have to give up the man you love or get out."

A group that represents cross-border gay and lesbian couples, Immigration Equality, estimates that there are more than 25,000 such couples in the United States. Many break the law. They place advertisements like this one in *The Washington Blade*, a gay paper: "Marriage-Minded GWM/GAM couple (1 American, 1 foreign), seeks lesbian couple (1 American, 1 foreign) for marriages of mutual interests."

That's a risky move, however, one that carries penalties of imprisonment and deportation. So in 2002 Kloss sold his beloved house in the center of San Francisco, with its view of the Marin headlands, and moved with Collette to Toronto. Last year they were married under Canadian law, which allows gays to bring in partners.

Kloss was lucky to have even that choice. If the partner doesn't hail from one of the countries with such a policy (which also include the United Kingdom, Israel, and several European states), gay couples find themselves perpetual tourists, insecure and unemployable.

John Sutton, for example, fell in

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sometimes society must make changes in the name of fairness or decency, even if there are bound to be hidden costs.

If the ban on same-sex marriage were only mildly unfair or if the costs of lifting it were certain to be catastrophic, then the ban could stand on Hayekian grounds. But if there is any social policy today that has a claim to being scaldingly inhumane, it is the ban on gay marriage. Marriage, after all, is the most fundamental institution of society and, for most people, an indispensable element of the pursuit of happiness. For the same reason that tinkering with marriage should not be undertaken lightly (marriage is important to personal and social well-being), barring a whole class of people from marrying imposes an extraordinary deprivation. Not so long ago, it was illegal in certain parts of the United States for blacks to marry whites; no one would call this a trivial disfranchisement. For many years, the champions of women's suffrage were patted on the head and told, "Your rallies and petitions are all very charming, but you don't really *need* to vote, do you?" It didn't wash. The strong Hayekian argument has traction only *against a weak moral claim.*

To rule out a moral and emotional claim as powerful as the right to marry for love, saying that bad things might happen is not enough. Bad things always might happen. People predicted that bad things would happen if contraception became legal and widespread, and indeed bad things did happen, but that did not make legalizing contraception the wrong thing to do; and, in any case, good things happened too. Unintended consequences can also be positive, after all.

Besides, by now the traditional understanding of marriage, however you define it, has been tampered with in all kinds of ways, some of them more consequential than gay marriage is likely to be. No-fault divorce dealt a severe blow to

love with a Mexican interior decorator who was working illegally in San Francisco. Sutton, 38, left a job as an office manager for a coffee company, put his possessions in storage with friends in Fremont, and moved to Mexico—where he can't work—to be with his partner, Max. Sutton returns every six months to renew his tourist visa and take temporary employment.

"Our option was leave the U.S. or not be a couple, so it wasn't really a choice," he says. If Max were a woman, they could have married and set her on the fast track for a green card. Instead, Sutton was left watching the esoteric debate over gay marriage with something like envy. "Inheritance and hospital visitation rights and all of those things are great—but we would be thrilled just to live together here [in the U.S.]," he says.

So far, stories like Sutton's have not been heard much in the fight over gay marriage. That's partly because advocates of gay immigration rights try to keep the issue distinct from the charged marriage debate. But the argument for gay marriage loses force when it focuses only on the other rights—important, but not crucial—in question. By contrast, bi-national couples face a clear, terrible choice, and their stories should add urgency to a national debate that has focused on symbolism.

But don't expect the law to change any time soon, even if some states make gay marriage legal. Rep. Jerrold Nadler (D-N.Y.) has introduced a Permanent Partners Immigration Act that would put gays and straights on equal footing. The bill has 120 sponsors in the House and 11 in the Senate, but it hasn't moved since being introduced in 2000.

"I'm not terribly optimistic in the immediate future," says Nadler, who calls the status quo "gratuitously cruel." "We've been begging the chairman [of the immigration subcommittee of the House Judiciary Committee] for three years, and so far he hasn't scheduled a hearing or a markup or a vote."

The subcommittee chairman is Lamar Smith (R-Texas), who didn't respond to a request for comment on the bill. But Smith's views on homosexuality aren't a secret. He recently wrote in an online column (archived at lamarsmith.house.gov) that "same-sex marriage, and the lifestyle that accompanies it, should not be endorsed because it is unhealthy and unnatural."

The backlash in Washington is in stark contrast to expanding rights for gays in Europe, Canada, and elsewhere. For gays and lesbians with foreign partners, America is becoming a less and less attractive place to live. There's no reliable estimate of how many Americans leave each year for "exile," says Adam Francouer of Immigration Equality, but "we expect that number to increase as the gap widens." ■

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"till death do us part," which was certainly an essential element of the traditional meaning of marriage.

It is hard to think of a bigger affront to tradition than allowing married women to own property independently of their husbands. In *What Is Marriage For?*, her history of marriage, the journalist E.J. Graff quotes a 19th-century New York legislator as saying that allowing wives to own property would affront both God and nature, "degrading the holy bonds of matrimony [and] striking at the root of those divinely ordained principles upon which is built the superstructure of our society." In 1844 a New York legislative committee said that permitting married women to control their own property would lead to "infidelity in the marriage bed, a high rate of divorce, and increased female criminality" and would turn marriage "from its high and holy purpose" into something arranged for "convenience and sensuality." A British parliamentarian denounced the proposal as "contrary not only to the law of England but to the law of God."

Graff assembles other quotations in the same vein, and goes on to add, wryly, "The funny thing, of course, is that those jeremiads were right." Allowing married women to control their economic destinies did indeed open the door to today's high divorce rates; but it also transformed marriage into something less like servitude for women and more in keeping with liberal principles of equality in personhood and citizenship.

An off-the-cuff list of fundamental changes to marriage would include not only divorce and property reform but also the abolition of polygamy, the fading of dowries, the abolition of childhood betrothals, the elimination of parents' right to choose mates for their children or to veto their children's choices, the legalization of interracial marriage, the legalization of contraception, the criminalization of marital rape (an offense that wasn't even recognized until recently), and of course the very concept of civil marriage. Surely it is unfair to say that marriage may be reformed for the sake of anyone and everyone except homosexuals, who must respect the dictates of tradition.

Some people will argue that permitting same-sex marriage would be a more fundamental change than any of the earlier ones. Perhaps so; but equally possible is that we forget today just how unnatural and destabilizing and contrary to the meaning of marriage it once seemed, for example, to put the wife on a par, legally, with the husband. Anyway, even if it is true that gay marriage constitutes a more radical definitional change than earlier innovations, in an important respect it stands out as one of the narrowest of reforms. All the earlier alterations directly affected many or all married couples, whereas same-sex marriage would directly pertain to only a small minority. It isn't certain that allowing same-sex couples to marry would have any noticeable effect on heterosexual marriage at all.

True, you never know what might happen when you tinker with tradition. A catastrophe cannot be ruled out. It is worth bearing in mind, though, that predictions of disaster if open homosexuals are integrated into traditionally straight institutions have a perfect track record: They are always wrong. When openly gay couples began making homes together in suburban neighborhoods, the result was not Sodom on every street corner; when openly gay executives began turning up in corporate jobs, stud collars did not replace neckties. I vividly remember, when I lived in London in 1995, the forecasts of morale and unit cohesion crumbling if open homosexuals were allowed to serve in the British armed forces. But when integration came (under

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court order), the whole thing turned out to be a nonevent. Again and again, the homosexual threat turns out to be imaginary; straights have far less to fear from gay inclusion than gays do from exclusion.

Jeopardizing Marriage's Universality

So the extreme Hayekian position—never reform anything—is untenable. And that point was made resoundingly by no less an authority than F.A. Hayek himself. In a 1960 essay called "Why I Am Not a Conservative," he took pains to argue that his position was as far from that of reactionary traditionalists as from that of utopian rationalists. "Though there is a need for a 'brake on the vehicle of progress,'" he said, "I personally cannot be content with simply helping to apply the brake." Classical liberalism, he writes, "has never been a backward-looking doctrine." To the contrary, it recognizes, as reactionary conservatism often fails to, that change is a constant and the world cannot be stopped in its tracks.

His own liberalism, Hayek wrote, "shares with conservatism a distrust of reason to the extent that the liberal is very much aware that we do not know all the answers," but the liberal, unlike the reactionary conservative, does not imagine that simply clinging to the past or "claiming the authority of supernatural sources of knowledge" is any kind of answer. We must move ahead, but humbly and with respect for our own fallibility.

And there are times, Hayek said (in *Law, Legislation, and Liberty*), when what he called "grown law" requires correction by legislation. "It may be due simply to the recognition that some past development was based on error or that it produced consequences later recognized as unjust," he wrote. "But the most frequent cause is probably that the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice....Such occasions when it is recognized that some hereto accepted rules are unjust in the light of more general principles of justice may well require the revision not only of single rules but of whole sections of the established system of case law."

That passage, I think, could have been written with gay marriage in mind. The old view that homosexuals were heterosexuals who needed punishment or prayer or treatment has been exposed as an error. What homosexuals need is the love of another homosexual. The ban on same-sex marriage, hallowed though it is, no longer accords with liberal justice or the meaning of marriage as it is practiced today. Something has to give. Standing still is not an option.

Hayek himself, then, was a partisan of the milder version of Hayekianism. This version is not so much a prescription as an attitude. Respect tradition. Reject utopianism. Plan for mistakes rather than for perfection. If reform is needed, look for paths that follow the terrain of custom, if possible. If someone promises to remake society on rational or supernatural or theological principles, run in the opposite direction. In sum: Move ahead, but be careful.

Good advice. But not advice, particularly, against gay marriage. Remember Hayek's admonition against dogmatic conservatism. In a shifting current, holding your course can be just as dangerous as oversteering. Conservatives, in their panic to stop same-sex marriage, jeopardize marriage's universality and ultimately its legitimacy. They are taking risks, and big ones, and unnecessary ones. The liberal tradition and the Declaration of Independence are not currents you want to set marriage against.

It is worth recalling that Burke, the patron saint of social conservatism and the scourge of the French Revolution, supported the American Revolution. He distinguished between a revolt that aimed to overthrow established rights and principles and a revolt that aimed to restore them. Many of the American founders, incidentally, made exactly the same distinction. Whatever else they may have been, they were not utopian social engineers. Whether a modern-day Burke or Jefferson would support gay marriage, I cannot begin to say; but I am confident they would, at least, have understood and carefully weighed the possibility that to preserve the liberal foundation of civil marriage, we may find it necessary to adjust its boundaries. ▪

Jonathan Rauch is a columnist for National Journal, a correspondent for The Atlantic Monthly, and a writer in residence at the Brookings Institution in Washington, D.C. *This article is adapted from his book Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America.* *Copyright ©2004 by Jonathan Rauch. Reprinted by arrangement with Times Books, an imprint of Henry Holt and Company. All rights reserved.*

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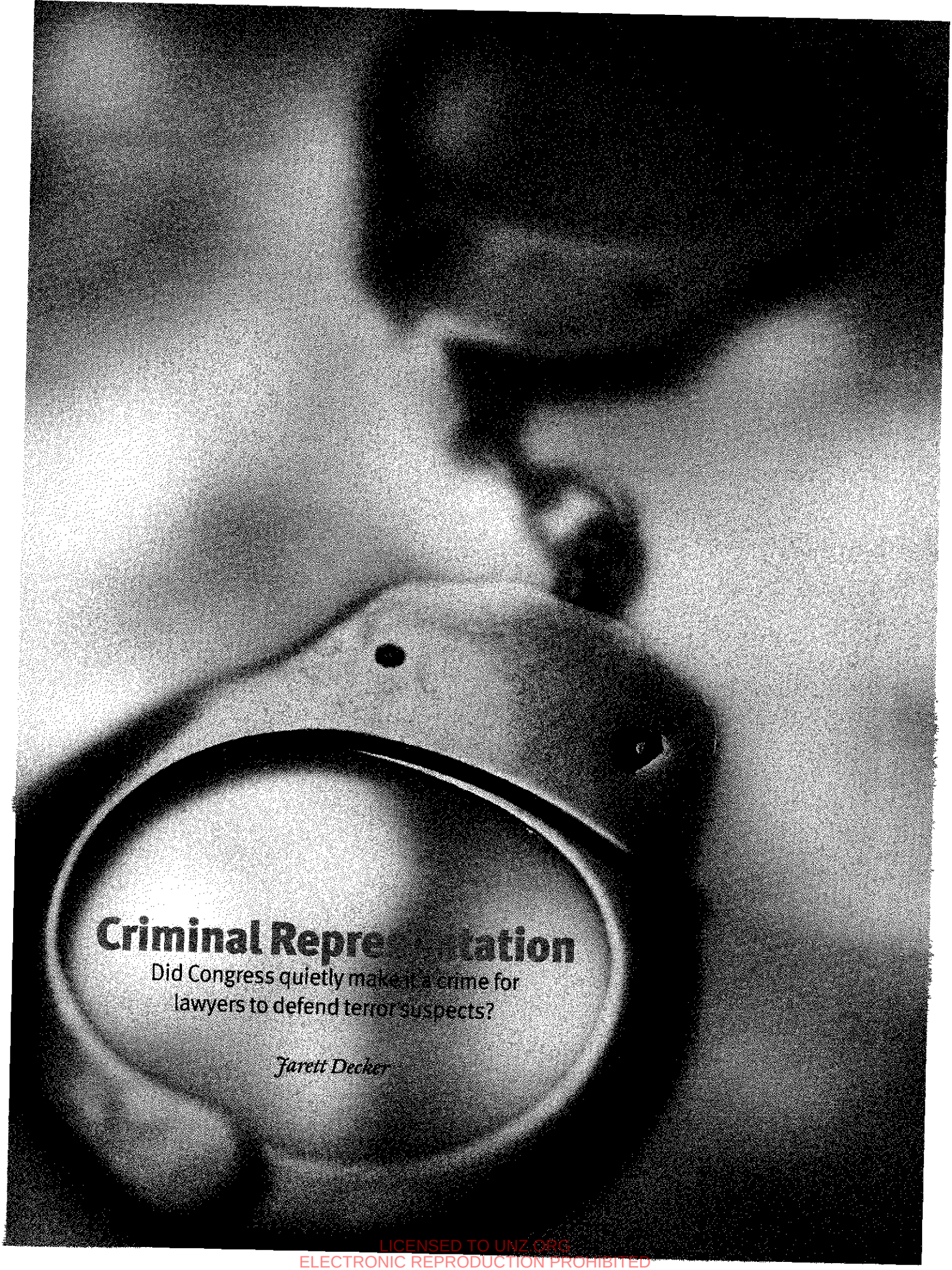

Criminal Representation

Did Congress quietly make it a crime for lawyers to defend terror suspects?

Jarett Decker

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On May 17, 2004, the left-wing lawyer Lynne Stewart will go on trial in New York for allegedly helping a convicted terrorist leader direct jihad operations from inside a federal prison.

Stewart has admitted in interviews since her indictment that in June 2000 she broke an agreement with the Justice Department and violated Bureau of Prisons restrictions to help her imprisoned client, the "blind sheikh" Omar Abdel Rahman, issue a press release to the Reuters news service recommending that his followers in the Islamic Group in Egypt abandon a two-year-old "cease-fire." The Islamic Group was responsible for the 1997 gun-and-knife massacre of 58 foreign tourists and four Egyptians at Luxor as well as other attacks.

Stewart claims that in issuing Abdel Rahman's press release, she did "nothing more than any other lawyer would ever do," helping her client communicate with the outside world and exercising her own right to free speech. She says she is being singled out for representing a reviled client.

Casual observers may be forgiven for dismissing the Stewart prosecution as an anomalous case of a reckless lawyer facing repercussions for irresponsible conduct, with no broader implications for the justice system. It's true that Lynne Stewart makes an implausible civil liberties heroine. She has expressed admiration for Abdel Rahman's decidedly illiberal vision of "positive social change," arguing that the radical Islamic revolution he seeks is "the only hope" for various oppressed peoples in the Middle East. She maintains that American criticism of the Taliban's treatment of women is a case of "the pot calling the kettle black" because of supposedly comparable discrimination against women here. And by her own admission, Stewart concluded for herself that the Bureau of Prison restrictions on Abdel Rahman's communications with the outside world were unreasonable and, instead of challenging the restrictions in court, deliberately helped the sheikh circumvent them.

Yet Stewart's prosecution has revealed a broad and troubling Justice Department strategy. This strategy goes far beyond the need to make sure lawyers abide by restrictions on prisoner communications—restrictions motivated by the legitimate security concerns that cases like this raise. For that purpose, it would be sufficient to criminalize attorney violations of the restrictions known as "special administrative measures" (SAMs), which have been used since the Clinton administration to prevent Abdel Rahman and other imprisoned terrorists from communicating (directly or indirectly) with their supporters on the outside. Instead, the Justice Department is pursuing a course that threatens the Sixth Amendment right to legal representation by exposing just about any attorney who represents a suspected terrorist to the risk of prosecution, thereby discouraging lawyers from taking such cases or, if they do, from representing their clients zealously.

The conduct for which Stewart was charged occurred before September 11 and before Congress passed the USA PATRIOT Act, a statute aimed at enhancing federal power to fight terrorism. Stewart could not be prosecuted under the PATRIOT Act because of the Constitution's Ex Post Facto Clause, which forbids the application of criminal laws to conduct that occurred before they were passed. That was a lucky break for Stewart, who is instead charged under a predecessor law with providing "personnel" to a terrorist group (by helping Abdel Rahman maintain his leadership role from prison) and with committing "fraud" and uttering "false statements" by promising to abide by the SAMs when she allegedly had no intention of doing so—a state of mind that may be difficult to prove.

Had the timing of her actions been different, Stewart could have been charged with violating a little-noticed provision of the PATRIOT Act that makes it a crime to provide "expert advice or assistance" to a terrorist group. Although the Justice Department cannot use that provision against Stewart—and a California federal judge recently limited its reach—the department's court submissions in her case take the position that legal representation of alleged terrorists is a crime under the PATRIOT Act if the lawyer can be portrayed as acting under "the direction and control" of a foreign terrorist organization. The law does not require any intent to further illegal activities, and the Justice Department contends that there is no exception for "good faith" or "bona fide" legal representation.

All lawyers work "under the direction and control" of their clients, within the limits of the rules of ethics. If the Justice Department's interpretation of the PATRIOT Act is accepted by the

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courts, any lawyer who represents a terrorism suspect can be charged with a crime if the government claims his client's directives also represent the directives of the terrorist organization the client is accused of serving. In virtually any terrorism case that does not involve a "lone wolf" defendant, it could be alleged that the defendant is acting on behalf of his organization as well as himself in directing his lawyer (as the government alleges in Stewart's case). Defense lawyers who represent accused terrorists may have to depend on the self-restraint of federal prosecutors to avoid facing criminal charges themselves.

Lynne Stewart admits to passing on a message that essentially recommended that her client's followers should resume murdering people, so it's pretty clear that she crossed the boundary of appropriate behavior for defense lawyers in terrorism cases. Whether her conduct was criminal is, of course, for a jury to decide. But her prosecutors' comments about the PATRIOT Act show that the Justice Department wants to radically redraw the boundaries for lawyers who do nothing more than zealously defend their clients. The Justice Department's position offers a glimpse into the future for responsible lawyers who have the courage to defend accused terrorists. The view is ominous.

Lawyer, Defend Thyself

It may seem fanciful to suggest that criminal charges would be brought against a lawyer for nothing more than representing a client in court proceedings, and in fact that power is unlikely to be exercised routinely. But the Justice Department's history suggests that charges may be used, or threatened, against lawyers who represent the government's prime targets too often or too well. And the mere existence of the law and the possibility of charges may chill the zeal of all but the bravest defenders. There is reason to believe this was not an unintended consequence of the PATRIOT Act but the realization of a longstanding Justice Department goal.

Section 805(a)(2) of the PATRIOT Act, the provision that allows prosecution of lawyers, did not spring from nowhere. It has a history in the Justice Department's quiet campaign during the last 15 years to create precedents and obtain legislation that would give federal prosecutors broad

Lynne Stewart at June 2002 news conference, AP/Wide World Photos

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Lynne Stewart makes an implausible civil liberties heroine. She has expressed admiration for Sheikh Abdel Rahman's illiberal vision, arguing that the radical Islamic revolution he seeks is "the only hope" for various oppressed peoples in the Middle East.

power to bring charges against defense lawyers for alleged misconduct in criminal cases. To put it simply, federal prosecutors would like to be both players and referees in the adversarial game of criminal litigation, with authority to penalize their opponents at will.

The Justice Department's ambitions can be seen in several prosecutions during the 1990s in which criminal charges were brought against defense lawyers in an apparent attempt to muzzle the government's most formidable adversaries. Two notorious examples are the prosecutions of the San Francisco lawyer Patrick Hallinan and the Minneapolis lawyer Randall Tigue.

In the early '90s Hallinan, ranked by *The Best Lawyers in America* as one of the top criminal defense lawyers in the country, handed the Justice Department a streak of high-profile defeats, including a particularly humiliating partial acquittal and jury deadlock in the sensational prosecution of U.S. District Court Judge Robert Aguilar, who was accused of misconduct on the bench. Shortly thereafter the Justice Department cut a deal with one of Hallinan's clients, a marijuana smuggler, allowing him to keep more than $4 million in forfeitable profits from drug dealing in exchange for his testimony implicating Hallinan in a drug conspiracy.

Hallinan was indicted, and the government pushed the case all the way to verdict, relying on the testimony of Hallinan's former client and a number of other drug dealers who also received accommodations from the government for their help. Hallinan's law practice was shut down for two years during the criminal investigation and six-week trial, while Hallinan fought for his freedom and reputation. Ultimately, it took a federal jury a few hours of deliberation to clear Hallinan of all charges.

Randall Tigue, a First Amendment specialist and former head of the Minnesota Civil Liberties Union, made enemies at the Justice Department through his longtime successful representation of Minnesota's "porn king," Ferris Alexander, owner of a string of sex shops in the state. Alexander was a perennial target of the Justice Department for alleged distribution of obscene materials and tax evasion, but for about 15 years Tigue managed to keep his client out of jail and in business.

Then, when federal prosecutors attempted an innovative use of the Racketeer Influenced and Corrupt Organizations Act in an obscenity prosecution against Alexander, they hit upon an effective tactic for assuring that Tigue could not defend the case: They had Tigue himself indicted, alleging that he conspired with Alexander by helping him set up corporations for some of his business interests. Minnesota lawyers, convinced that Tigue had committed no crime, started a collection and raised $100,000 for his defense. A federal jury acquitted Tigue of all charges. But Alexander, without Tigue to defend him, was convicted of racketeering and obscenity.

Criminal Expertise

The Justice Department's attacks on defense lawyers have created unease in the federal appellate courts, even among some of the most pro-prosecution judges. In a 1995 ruling, *Hubbard v. United States*, the U.S. Supreme Court tried to rein in the Justice Department by narrowing the reach of the federal law prohibiting false statements to the government, Section 1001 of the Federal Criminal Code, so that prosecutors could not use the law against defense lawyers for making statements in court with which the prosecution disagreed.

Justice Antonin Scalia, not usually known as

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Legal representation of alleged terrorists is a crime under the PATRIOT Act if the lawyer can be portrayed as acting under "the direction and control" of a foreign terrorist organization. There is no exception for "good faith" or "bona fide" legal representation.

an ally of the criminal defense bar, explained in a concurring opinion that he had "serious concern that the threat of criminal prosecution under the capacious provisions of Section 1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of Section 1001 prosecution." The *Hubbard* ruling confirmed the principle that judges and independent attorney disciplinary committees, not partisan prosecutors, generally should exercise the power to determine when lawyers have crossed the line in representing their clients in court proceedings.

So while the Justice Department has found that it can use its prosecutorial powers to disrupt and shut down some of its adversaries in the defense bar, federal judges and juries have imposed troublesome constraints. To tip the scales in its favor, the Justice Department needed legislation giving federal prosecutors broad authority to bring charges against defense lawyers. It smelled an opportunity in early 1995, following the Republican takeover of Congress and the bombing of the Alfred P. Murrah Building in Oklahoma City, which created a climate favorable to all manner of law-and-order measures. Sen. Orrin Hatch (R-Utah), one of the Justice Department's most reliable allies in Congress, introduced a bill that would have made it a felony for a lawyer to knowingly make "a false statement of fact or a false statement of law" in a federal criminal case. Because federal prosecutors determine who is a target for indictment, as a practical matter the proposed law would have applied only to defense lawyers, not prosecutors.

The Hatch bill went much further than overturning the *Hubbard* decision, because it would have empowered federal prosecutors to charge defense lawyers not just for misrepresenting facts but for offering interpretations of the law with which the Justice Department disagreed. Virtually every contested case involves lawyers offering conflicting interpretations of the law to the court, so the Hatch bill would have exposed defense lawyers to possible prosecution in almost every federal criminal case. Remarkably, the bill would have allowed the indictment of defense lawyers for false statements in court proceedings even if the presiding judge did not agree there was any dishonesty.

When Lawyering Becomes Crime

Unfortunately for the Justice Department, after the initial shock from the Oklahoma City tragedy wore off, Congress settled back into its normal legislative routine. Some sweeping crime and terror legislation was passed, notably the Antiterrorism and Effective Death Penalty Act (AEDPA), which featured an expansive definition of terrorism and broad prohibitions on any "material support" for designated foreign terrorist organizations. But the Hatch bill and a similar bill in the House stalled after heavy criticism by legal experts in House committee hearings.

The political fallout from the Oklahoma City bombing, as profound as it was, was not enough to cause Congress to abandon its basic duty of debate and scrutiny in making law. It would take a greater tragedy for that to happen.

On October 26, 2001, just six weeks after the attacks on the Pentagon and the World Trade Center, the 107th Congress passed the 350-page legislative excretion known as the USA PATRIOT Act. As has often been remarked since then, the bill was fed to Congress whole by Justice Department draftsmen and then dumped into the U.S. Code in haste, largely unread and undigested by those who voted for it. It is a fool's errand to ascribe any particular intent to Congress

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in passing the PATRIOT Act, beyond the desire to be seen as taking strong measures against terrorism. The specific provisions of the act are almost entirely the work of the Justice Department.

One provision that passed without scrutiny was Section 805(a)(2), which expanded the definition of "material support" to foreign terrorist organizations. Under the AEDPA, "material support" already included financing, weapons and explosives, lethal substances, training, personnel, facilities, lodging, safe houses, communications equipment, transportation, and "other physical assets." The PATRIOT Act added a new item to the litany of the banned: "expert advice and assistance." There is no legislative history to explain why the addition was necessary, or what the Justice Department draftsmen had in mind. That would not become clear until the prosecution of Lynne Stewart.

In a June 2003 hearing in Stewart's case, Assistant U.S. Attorney Christopher Morvillo acknowledged that Stewart could not be charged under the PATRIOT Act with providing "expert advice and assistance" to the Islamic Group because her conduct predated the law. But Morvillo stressed that the "expert advice and assistance" banned by the PATRIOT Act includes legal representation. Then, in a remarkable June 27, 2003, letter to the presiding judge, Assistant U.S. Attorney Robin Baker explained that under the Justice Department's interpretation, an attorney could be convicted of a crime for representing a client allegedly associated with a foreign terrorist organization "IF the foreign terrorist organization has been designated as such by the Secretary of State—and IF the government could prove that the attorney was acting under the direction and control of the foreign terror organization"—even if the attorney did nothing but provide "bona fide legal services."

Baker specifically rejected any notion that the government would have to prove intent on the lawyer's part to further illegal activities, because that "is not constitutionally compelled and is inconsistent with the plain text and structure of the statute." Speaking for the Justice Department, Baker concluded that "criminalizing attorney representation" does "not render the prohibition [on material support] unconstitutional." Baker allowed that "Congress could bestow upon attorneys (or others) an express or implied right to act as an agent of a designated foreign terrorist organization in certain circumstances." Any attorney without such a blessing from Congress would be fair game.

In short, the Justice Department believes that by quietly inserting the ban on "expert advice and assistance" into the PATRIOT Act, it got what it could not get through the more ham-fisted Hatch bill of 1995: a broad power to prosecute defense lawyers who get in the way, at least in terrorism cases.

If the rulings so far in the Lynne Stewart case are any indication, the federal courts may find no constitutional authority to strike down the criminal ban on "expert advice and assistance" as applied to attorneys. On July 22, 2003, U.S. District Court Judge John G. Koeltl threw out two of the four charges then pending against Stewart, specifically those alleging that she provided and conspired to provide material support to the Islamic Group. Some of Stewart's supporters and news media commentators hailed the ruling as a victory for the defense bar. They need to read it more carefully.

Terrorizing Lawyers

Because Stewart could not be charged under the PATRIOT Act with providing "expert advice and assistance," prosecutors had to stretch the terms of the AEDPA to charge her with providing material support to a terrorist group. They alleged that Stewart illegally provided the Islamic Group with "personnel" (namely herself) and "communications equipment" (consisting of the office equipment she used to issue a press release to Reuters in Egypt announcing that Sheikh Abdel Rahman favored abandoning the cease-fire).

Judge Koeltl found that the government had stretched the AEDPA too far. Because the charges involve issuing a press release, he applied the "heightened scrutiny" required for laws that implicate First Amendment rights. He concluded that the ban on providing "personnel" does not clearly and fairly warn that a person can be charged for "providing himself," and that the ban on providing "communications equipment" does not clearly and fairly warn that a person can be charged for using communications equipment rather than turning it over to a terrorist organization. But Koeltl specifically rejected a constitutional argument that the ban on material support is overbroad. That means that the law stands and can be used against lawyers (and others) when its terms fairly and clearly apply.

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Defense lawyers will have to consider whether they may anger the Justice Department too much and face the personal and professional ruin that an indictment would bring, regardless of whether they could ever be proven guilty of a crime.

In November the prosecution tried to resurrect the "material support" charges with a new legal theory in a superseding indictment. The new charges allege that Stewart provided and conspired to provide Abdel Rahman as "personnel" to the Islamic Group in violation of the AEDPA, because his instructions and leadership would not have been available to the terrorist group without Stewart's efforts. Stewart's counsel has moved to dismiss the new charges on the grounds that the ban on providing "personnel" to a terrorist group does not clearly and fairly warn that a person can be charged for passing messages from a prisoner to the press. The motion is pending as of this writing, but judging from his prior rulings, Judge Koeltl may well side with the defense again. Even if he does, that will leave the fraud and false statement charges pending against Stewart and will provide little comfort to attorneys facing the PATRIOT Act's ban on providing "expert advice and assistance."

Whatever else may be said of the ban on "expert advice and assistance," its plain terms would seem to encompass legal representation. Lawyers will be hard-pressed to argue that the ban is too vague as applied to them. And ironically, lawyers who provide ordinary and bona fide legal services in defending terrorism suspects may be more vulnerable than Lynne Stewart, whose actions went beyond appropriate legal representation but who could more easily claim First Amendment protection because her conduct involved the issuance of a press release.

The most obvious constitutional challenge to the ban on "expert advice and assistance" would be that the law infringes on the Sixth Amendment rights of defendants to effective assistance of counsel. But here the PATRIOT Act's pernicious ingenuity becomes clear: The law can have enormous impact while very rarely being invoked, because defense lawyers will have to consider with their every legal maneuver whether they may anger their adversary too much and face the personal and professional ruin that an indictment would bring, regardless of whether they could ever be proven guilty of a crime.

The effect of the law may be pervasive and profound, but unless the law is invoked by the government in a particular case, it will be difficult to prove a violation of the Sixth Amendment. There is no constitutional precedent for striking down laws because they create a general environment of fear that prevents defense lawyers from providing the full measure of zealous representation. Perhaps the courts will make some.

In January a federal trial judge in California held that the PATRIOT Act's ban on expert advice and assistance violates the First Amendment when applied to the activities of certain international human rights groups. But it is not clear whether that ruling would extend to lawyers not engaged in political advocacy, nor is it clear whether the ruling will withstand appeals or be followed in other courts. The U.S. Court of Appeals for the 9th Circuit, which will hear the case on appeal, is known for its sympathy to defendants' rights but is frequently reversed by the Supreme Court.

In the end, the courts may find the ban on "expert advice and assistance" as applied to defense lawyers too much to stomach. But that will require brave lawyers to take great risks in the interim. Randall Tigue and Patrick Hallinan have done their service. Civil libertarians have to hope there are more lawyers like them. ▮

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The Urine Police

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Home run king Barry Bond's personal trainer has been charged with illegal drug distribution, adding fuel to the rumors that Bonds has used anabolic steroids to bulk up his already muscular frame. But there are plenty of other bigger and stronger guys than Barry Bonds who could spend a lifetime at home plate without ever banging a home run into San Francisco Bay.

Bond's incredible home run hitting ability also comes from his extraordinarily keen eyesight, superb reflexes, sense of balance, knowledge of the game, and brain wiring that we can only guess at. So the question is, **would we have unleashed the urine police, federal agents, prosecutors, and a grand jury if a jock had been suspected of taking drugs to enhance his eyesight or other physical characteristics possessed by great athletes?**

The muddled answer that we get from the mother of all nannies, the Food and Drug Administration (FDA), is that these anabolic steroids, synthetic versions of the male hormone testosterone, may, in future years, be shown to be dangerous to health and should be "nipped in the bud." Really? My cardiologist tells me that aspirin could be fatal for me, as it is for several thousand Americans a year, because it conflicts with other medications. If we're worrying about danger, shouldn't we also outlaw skateboarding, surfing, downhill skiing, horseback riding, mountain climbing, skydiving, ice cream, chocolate, and bacon cheeseburgers?

The standard warnings on prescription and over-the-counter medicines are similar to the mumbo jumbo about steroids from the FDA. Indeed, the absence of class action lawsuits suggests that the ever-alert class action lawyers haven't even discovered this health crisis. Nor do the nebulous claims from establishment guardians of virtuosity in youthful athletes that we must have a "level playing field" for all make sense. I have news for them. **When Barry Bonds and his fellow greats were born, only a handful of others were on a level playing field with them.**

I'm no advocate of testosterone or other diet supplements. In fact, a couple of times a week, my senior men's doubles group watches in envy as the slender youngsters on the Stanford women's tennis team hit tennis balls fifty or seventy miles an hour faster than we bulked men are able to do. Their superior timing, technique, and training would drive us off the court in five minutes.

As someone who spent most of his life as a police officer, I think the government should be spending its resources and our money finding bin Laden and destroying Al Queda, not launching investigations into which jocks are using supplements determined immoral by the federal government.

—Joseph D. McNamara

Joseph D. McNamara is a research fellow at the Hoover Institution.

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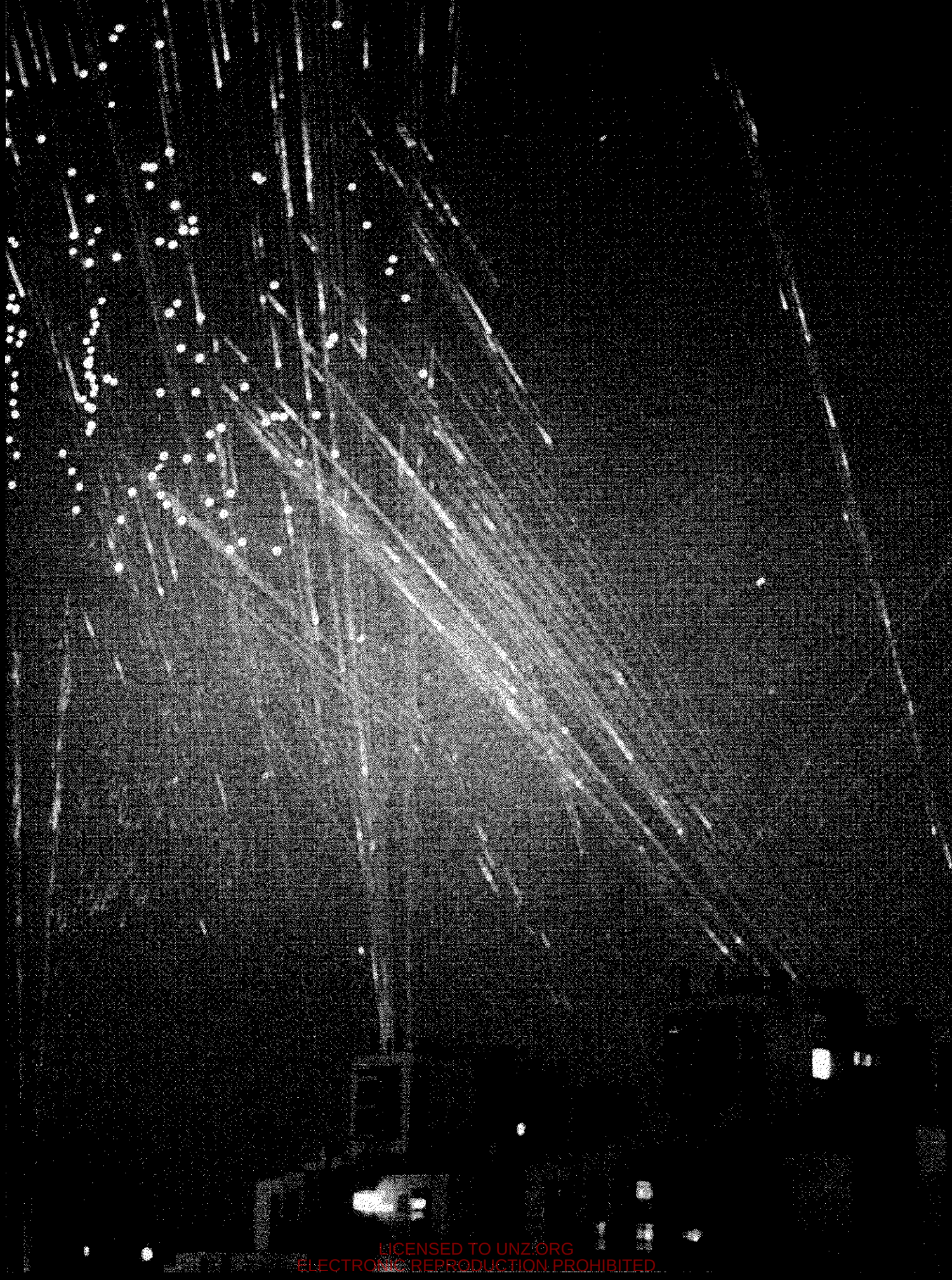

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Out of the Info Loop

Why information networks are crucial to modern warfare

Bryan Alexander

The New Face of War: How War Will Be Fought in the 21st Century, by Bruce D. Berkowitz, New York: Free Press, 272 pages, $26

The CIA at War: Inside the Secret Campaign Against Terror, by Ronald Kessler, New York: St. Martin's Press, 496 pages, $27.95

DURING THE 1999 Kosovo war, American forces pounded Serbian ground targets from the skies. Less famously, they also attacked with what Pentagon strategists call information operations, or I.O. The goal was to cause economic and political panic in the Serbian leadership. The methods ranged from cutting electrical power to hacking bank accounts to spamming e-mail boxes and Web servers. Important buildings were destroyed by cruise missiles and pinpoint munitions after a series of fax and phone messages appeared, delivering clear warnings of the attack and fomenting fear in the classic psychological operations mode.

By most assessments, this campaign had little effect. It did not fatally weaken the Serbian infrastructure. Coordination was ill-defined, legal problems persisted (is an electronic attack an attack on civilians?), and the effort was beset by such unforeseen problems as foreign ownership of some targeted media enterprises. Despite American advantages in Internet experience and programming power, no virus shut down Belgrade; the city did not endure the "digital Pearl Harbor" of so many I.O.-fueled speculations. Indeed, Serbs also took to the Net, fighting for media dominance internally and abroad and perhaps hacking in return.

Such results disappointed those with high hopes for information warfare. But the approach has remained part of the American arsenal, and it has expanded vigorously since 9/11, albeit with unclear results. Two new books, Bruce Berkowitz's *The New Face of War* and Ronald Kessler's *The CIA at War*, attempt to describe and assess I.O. in the context of the war on terror.

Each author argues that information operations have transformed American forces: That they've led to smaller, more flexible units—and more flexible doctrine. Kessler's account ascribes the changes to the last phase of the Cold War, the rise of anti-terror operations, and personnel changes within the CIA. Berkowitz prefers a larger scope: He argues that the development of I.O. goes back decades, culminating in the first stage of a global shift to information warfare.

Berkowitz, a research fellow at the Hoover Institution, begins in the 1950s, as a series of thinkers recognized that the Cold War was linking vast military machines, nations, and globe-spanning alliances into new information networks. One function of those networks was the systematic, in-depth assessment of the other side's capabilities, in comparison with one's own, combining intelligence operations abroad and analysis at home. By the early '70s, the RAND Corporation's Andrew Marshall and Albert Wohlstetter offered an innovative analytical method which looked for imbalances between two forces.

At that time, the Pentagon was working from a parity model, trying to balance Soviet forces with its own at every register. In contrast, some threats were not so balanced. Short- and medium-range missiles, ineffective against the American homeland when based in the USSR, became dire threats when relocated to Cuba; submarines stationed offshore offered the capability not to counter American subs, but to decapitate the United States' command and control apparatus.

While concerns about these asymmetric threats prompted a series of American responses to perceived Soviet imbalances, asymmetry also became applicable to other forces without the size and resources of the USSR, such as the Vietnamese National Liberation Front or the Somali urban war clans. An American

Yugoslav Army anti-aircraft fire over Belgrade during NATO strikes, May 1999. ©Reuters

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military built to fight the Warsaw Pact in a conventional war on the German plains had to rethink its approach when confronted by the drastically underresourced Viet Cong.

Asymmetry combined with networks in 1976, when Boeing published engineer Thomas Rona's *Weapons Systems and Information War*. This monograph argued that communications and information support networks were sufficiently linked and cross-dependent to be inviting targets. In Berkowitz's words, "this meant that the best way to defeat your enemy was to attack the components of its information systems, and Rona was broad-minded in defining 'component.' It included the hardware, of course, but it could just as easily be software, the people operating the system, or the data that traveled through it."

A World War II example shows the implications of this insight. When the British cracked the German ENIGMA cryptography scheme, they had several options: They could use information gleaned from German messages to strike military targets pre-emptively, maintain the illusion that they had not broken the code so they could continue to decrypt German messages, or use the code to feed the Germans misinformation.

The New Face of War calls this "the Perennial Question of Information Warfare," arguing that it recurs to the present day: "*Deny, deceive, destroy, or exploit?* Do you transmit your own smoke signals to interfere with his? Do you send bogus signals to confuse your adversary so that he is easier to kill? Do you find the enemy sending the message and kill him? Or do you quietly watch the signals so you know where your adversary plans to be, head him off, and kill him then?"

When one thinks of information as an essential part of military operations, this question covers much broader ground. Berkowitz explains its importance by drawing on the work of the Air Force colonel and influential military theorist John Boyd. Considering the defeat of American F-105s by MiG-17s over Vietnam, Boyd theorized that military opponents fought each other through a sequence of steps: observation, orientation, decision, then action. He called this the "OODA loop." American pilots were flying faster aircraft than their enemies but were nevertheless outmaneuvered by Soviet planes using better intelligence on the ground (observation) and smaller turning radii (orientation), thus getting a jump on rapid decision and action.

> Al Qaeda's success on 9/11 shows that they have learned the importance of decentralized information networks in waging war today.

The party that completes its loop faster has a huge advantage over its enemy. Critically, information is central to each cycle—information about the enemy, the situation, and one's own forces. "This was the real answer to the Perennial Question," Berkowitz argues. "You can collect, analyze, and move your information faster than your opponent to get an edge." This means a combination of something like special forces operations with knowledge management: You weaken the enemy's cycle processing while speeding up your own loop to finish first. The September 11 attacks were a successful OODA run, with Al Qaeda striking before American intelligence and military agencies were able to connect the dots and react decisively.

The first major test combining these concepts for offensive purposes came during the first Persian Gulf War, with the desert flanking move that checkmated Iraqi forces in Kuwait. A small American task force led a pinpoint attack on Iraqi radar and communication systems, preventing the Iraqis from gathering information about what was going on in their western desert and stalling them in the first *O* of Boyd's OODA loop. At the same time allied flanking units used geographical positioning systems and a well-defended network to keep observing, while remaining oriented within the larger battle plans. Berkowitz differs with the received wisdom regarding this move, arguing that at that point "speed, usually critical to turning the corner in a traditional flanking maneuver, was not the most important factor. Even if they had not been fast, the Coalition forces could have outflanked the Iraqis, simply because the Iraqis could not see them, had no idea where they were, and did not know where they might reappear."

Other American military thinkers worked out implications of the attack. RAND's David Ronfeldt and John Arquilla attributed the Allied success to the preservation of their own networks coupled with the disruption of the enemy's. From cases like this, Ronfeldt and Arquilla conceived a network-centric military paradigm, which they dubbed "netwar" (or sometimes "cyberwar"). Large armed forces operating in centralized command structures would not be suited for such fighting, they argued, and

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in fact would be vulnerable. Instead, small, heterogeneous units operating within a network would be the most effective agents. Digital networks, such as the Internet or a group's intranet, would become important battlefields.

With this, *The New Face of War* completes its picture of I.O.'s lineage: asymmetrical threat analysis, OODA loops, and finally netwar. The past established, Berkowitz proceeds to patterns emerging in the present, describing information warfare's new concepts in terms of zapping, swarming, and network defense.

Zapping, more formally known as "precision destruction," occurs when the combination of networks and successful information looping allows one side to pinpoint specific targets, both human and inanimate. A case in point is the aforementioned prewarned destruction of selected Serbian buildings during the Kosovo war, where carpet bombing became a thing of the past. Precision munitions—"smart weapons" equipped with advanced sensing and guidance technologies, such as laser tracking and thermal sensors—are an essential component of zapping, but they work well only within a secure and correct information network. Recall the inadvertent bombing of China's Belgrade embassy, which was purportedly caused by out-of-date maps.

Assassination, incidentally, falls into the zapping category. "The problem today," Berkowitz writes, "is that modern weapons are so accurate and modern intelligence and communications systems are so sophisticated that it often seems impossible *not* to target a particular person."

Swarming is a form of netwar in which multiple units suddenly converge on a surprised target. They sneak beneath enemy notice during the preparation for attack, then pounce. Berkowitz uses the example of Al Qaeda's 2000 attack on the USS *Cole*, in which a local cell was able to coordinate intelligence on American movements and their own small ships, agents, and explosives. Another example involves American operations in Afghanistan, where ad hoc teams of CIA agents, Air Force bombers, satellites, and ground units would combine to swarm Taliban or Al Qaeda units.

Like zapping, swarming is available to any force with the network components. In their 2000 book *Swarming and the Future of Conflict*, Arquilla and Ronfeldt point to Mafia operations, globalization protesters, and historical examples from Napoleon to the Viet Cong and from "swarming Soviet anti-tank networks that played such a brilliant role in defeating the German blitzkrieg in the Battle of Kursk" to "fast-moving Zulu *impi*, capable of marching over 40 miles per day, [that] would break into small units as they went into the attack, surrounding their opponents and swiftly destroying their cohesion."

Network defense is exactly what it sounds like. In netwar situations, the security of networks becomes central. A truly devastating attack through network superiority alone is unlikely, Berkowitz argues, as the incomplete information assault in Kosovo demonstrates. An electronic Pearl Harbor would be too hard to control, too difficult to keep from blowing back on the operator, and too easily fixed. Instead, network command should supplement other forces. "Information warfare is rarely an end in itself," Berkowitz writes. "It is always a means to get ahead of your opponent so that you can destroy him, or leave him so cornered he will give up."

But perhaps network command shouldn't be left to the Pentagon. For network defense reasons, Berkowitz attacks the Defense Department's current mix of state control and federal purchasing cycles, arguing that the result is a weakly defended Internet. Individuals and companies suspicious of the Big Brother approach seen in the Clipper Chip and Communications Decency Act expend energies in withdrawing or opposing state measures, while fewer enterprises develop products—less powerful than they would have otherwise been—to assist the feds. Berkowitz recommends instead that the government shift more of the onus for command of the nets to companies.

The result, in his view, would be a larger market and better results for net command, and more available to defense. Companies working without strong legislative oversight, he writes, would be more likely to develop better software, and have a more cooperative attitude toward the government, than would firms laboring under bureaucratic scrutiny and control. This position stems not from libertarian economic arguments but from a sense of recent Internet history. During the 1990s the federal

The New Face of War (cover detail)

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government tried to push the Clipper Chip, prosecute Phil Zimmermann for distributing homegrown cryptography, and mandate weaker software security. This caused government influence over increasingly suspicious I.T. companies to wane. Berkowitz also suggests that rather than developing new network warriors, the agency should hire already skilled network analysts part-time, as a sort of distributed resource team.

The New Face of War concludes with a survey of intelligence work, focusing mostly on the CIA. This covers a lot of familiar ground; what makes it refreshing is the context of information warfare (always central to the narrative) and seeing familiar operations through the insights of Boyd, Arquilla, and Ronfeldt.

While *The New Face of War* keeps its narrative anchored in information warfare's development, *The CIA at War* is too often unmoored. Kessler, a former *Washington Post* reporter, focuses primarily on the institutional transformation of the CIA under George Tenet's leadership and its impact on the war on terror. He offers a heroic portrait of a CIA director rebuilding the agency into a more agile, effective organization, partly along network lines. The book's historical model is intriguing, and it offers some new background about the topic, but its approach underestimates the cognitive and organizational shifts that information warfare entails.

The CIA at War offers a historical narrative to explain the present state of the CIA. Kessler shows how the agency's focus on the Soviet Union began and grew, with the CIA developing skills and methods imaginatively and successfully. The CIA's attention shifted to terrorism in the 1980s, starting with the successful campaign against the Abu Nidal organization. (Nidal's group had staged terror acts and won a growing global audience. The CIA fed its leader disinformation to stoke his innate distrust into violent, organization-destroying paranoia.)

The transition to fighting terrorism was difficult, marked by competing internal cultures, as cowboys (action-prone activists) and professionals (procedure-focused managers) struggled for institutional power. In addition, the Aldrich Ames affair proved destructive of agency trust and morale, as the high-profile mole's long-unchecked career cast doubt on the CIA's ability to police itself. Moreover, the absence of a mission as clearly defined as the Cold War left the agency somewhat adrift. Kessler criticizes two directors of central intelligence, James Woolsey and John Deutsch, for their inability to reform the CIA, arguing that they fostered managerial problems, failed to turn around morale losses, and lost bureaucratic turf to the Pentagon.

There is some useful information in Kessler's description of how the CIA developed structures for fighting terrorism and improved operational efficacy. Kessler points to a post-9/11 emphasis on low-level initiative and increased information sharing as ways of better "connecting the dots." Kessler's defense of the CIA's approach to Islamist groups—the agency penetrates Al Qaeda and allies using local agents, not case officers—indicates that Tenet continues to stress human intelligence gathering. Intriguingly, Kessler mentions in passing the CIA's recruitment of Muslim academics and mullahs to speak out in favor of the United States. "We are creating moderate Muslims," one source says. Kessler takes this at face value, though many readers will suspect that the real purpose in recruiting influential Muslims is to use them to spread disinformation.

While Kessler provides a credible description of a CIA on the rebound, using information thoughtfully and with some awareness of its importance, his discussion of the war on terror is very weak. The information is thin, often drawn from newspaper accounts. The innovative campaign in Afghanistan receives scarcely four pages, a discussion that introduces an important CIA branch (the paramilitary Special Activities Division) we should have read about much earlier. Kessler's description of Tenet's reforms before and after September 11 consists largely of sweeping statements in the place of analysis (e.g., "In the end, it required a commitment by the entire U.S. government to change the way business was done").

Kessler's celebration of Tenet and his renovated agency becomes shrilly defensive in the face of criticism. When other observers charge that poor information-sharing in the intelligence world made the 9/11 attacks possible, the book responds by blaming the State Department and FBI while simultaneously claiming the attacks were impossible to predict. The constructive contributions of other agencies are sidestepped, as when Kessler removes the Philippine police from the scene of Operation Bojinka in 1995, when a Manila police officer acting on her own broke up an Al Qaeda plot to bomb civilian jetliners over the Pacific Ocean. Kessler defends other aspects of the war on terror in strange ways, as when he says Jose Padilla was arrested for

Escaping the Delta (cover detail); *The CIA at War* (cover detail)

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"the attempted dirty bomb attack on America," rather than the sketchier explanation the Department of Justice actually presented.

The 2003 war in Iraq receives fuller treatment, with more detailed descriptions of the CIA's preparatory work. Several passages in particular suggest information operations of the sort that Berkowitz describes. But Kessler barely explores the ramifications of this transformation in warfare. Instead, tantalizing references alternate with passionate denunciations of the Hussein regime and reiterations of the Bush administration's casus belli.

Kessler's thinness of information is complemented by a light style. Portentous sentence-long paragraphs dot the text. ("There were lessons to be learned from 9/11, Peterson told the analysts.") Policy discussions have a tendency to slide into detailed descriptions of meals and sex habits. Passages contradict themselves or lose their way—one begins by asserting that North Korea was not much of a threat, then concludes that it's a threat after all. The book jumps frequently across the 20th century, not always coherently; useful details are dropped in odd locations.

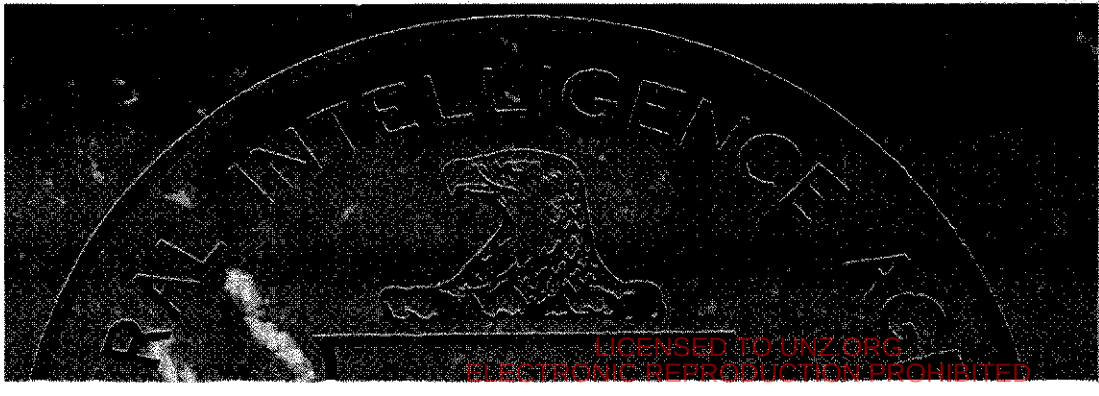
Taken together, these books make an implicit argument for the importance of historically grounding information operations. Netwar theory proves a useful lens through which to view recent history. Institutional transformation, for example, becomes something more than internal careerism and budgeteering; instead we see complex organizations grappling with novel concepts. When Berkowitz narrates the growth of information warfare through the Cold War, the conflicts of the 1990s, and the war on terror, information operations emerge as one replacement for the Pentagon's Cold War–era hierarchical command structures.

Kessler covers a different institution with a shorter chronology, seeing the new paradigm appearing instead from the ruins of the CIA's decline during the years just before and after the Soviet Union's collapse. Both the Defense Department and the CIA mutate and survive, generating new forms: netwar teams, counterterrorism centers. One open question is to what extent information warfare requires such creative structures, and how long they will last.

While Berkowitz emphasizes the universal utility of network warfare—he considers Al Qaeda's strikes a brilliant example of netwar—his primary focus is on America's use of it. Kessler is even more America-oriented, ignoring the intelligence agencies of U.S. allies and treating current enemies more as demons than as networks. Limitations of space, time, and institutional focus explain these omissions, but a more distributed sample would shed more light on the topic.

Netwar, after all, is a *global* tool, used by Serbian hackers and by Philippine protesters, by globalization activists and by transnational crime syndicates. The rapid growth of the I.O. model surely deserves attention, as does its role as one of the first truly global organizational structures.

The cultural framework behind networked warfare remains underexplored. Kessler makes



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Messing With the Blues

Revisionism comes to the Delta.

Jeff A. Taylor

Every casual blues fan has met a hard case, the guy—it is always a guy—who pores over the tiny ads in the back of *Goldmine* in search of "real" blues recordings. He is the keeper of esoteric sideman knowledge, the arbiter of notes bent and pre-bent, and sadly in need of being told to give it a rest.

In *Escaping the Delta: Robert Johnson and the Invention of the Blues* (Amistad/HarperCollins, 2004), Elijah Wald seems like he's out to take the stuffy blues purists down a notch or two with a fresh look at the received history of the blues. But despite his impressive scholarship and obvious love of the material, Wald winds up substituting his own prejudices for the old ones, which is not quite the improvement it could be.

Wald's central theme is that, far from being an obscure folk tradition rescued by Alan Lomax and other white field recordists, blues was thriving, diverse popular music. Wald »

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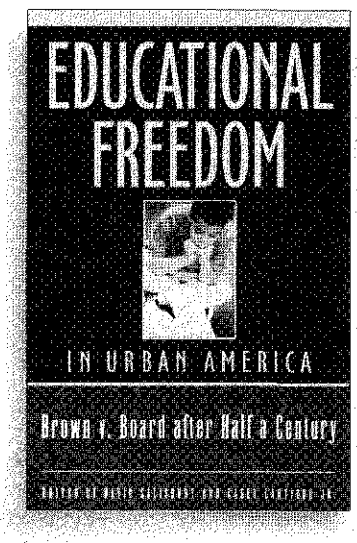

In 1954 the U.S. Supreme Court declared segregated public schools unconstitutional. The ruling in *Brown v. Board of Education* set public education on a course toward equality. Yet, five decades later, schools are not equal. In this collection of essays, a dozen leading scholars, educators, and reformers—including Andrew Coulson, Floyd Flake, Frederick Hess, and Paul E. Peterson—examine the modern barriers that deprive inner-city children of a good education. *Educational Freedom in Urban America* is essential reading for anyone concerned with the racial and social inequities that still exist in American education.

May 2004, 342 pp.
Cloth $24.95, ISBN 1-930865-56-2

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a first pass at this, linking networked creativity to the American dream of economic advancement and innovation, arguing that each supports the other. But he fails to develop his analysis of I.O. enough to establish a connection. Berkowitz's account is more institutional on this score, focusing on the Pentagon's development (sometimes despite itself) of netwar. But we can go further. America's military tradition has long emphasized low-level initiative, and our libertarian tendency supports the free flow of information. American culture is a fertile ground for netwar teams and their rapid, nearly improvisational operations.

Changes in business culture are also relevant to a discussion of I.O. To his credit, Berkowitz discusses this angle, partly through references to Arquilla and Ronfeldt, who in their analysis move readily from military to business to criminal groups. With due allowance for the persistence of managerial authority, the sustained shift from vertical command in enterprises to an increasing reliance on horizontal, team-based work suggests further grounding for American I.O. One detail merits further development, given American backwardness in the area: mobile technology. It would be interesting to see a non-American study of the American use of mobile devices in information warfare.

Perhaps more significantly, the recent history of political Islam bears on Al Qaeda's attachment to netwar. With the exceptions of the Iranian Islamic state and the brief Taliban rule in Afghanistan, Islamists tend to be in opposition, out of central governmental authority. Decades of experience in dissenting Brotherhoods, insurgent militias, or local leadership contesting central control encourages a greater affinity for information-centric organization than does running a traditional statist military organization.

Likewise, the marginal, guerrilla, or revolutionary experience fosters a facility for information operations. Consider Al Qaeda's distributed nature and roving career, its central core migrating from Saudi Arabia to Sudan to Afghanistan to (almost certainly) Pakistan, with franchise-like affiliates around the world negotiating for local leverage, material power, media play, and religious persuasion.

Some Islamists, such as those influenced by Sayyid Qutb, see the secular world as fallen and threatening enough to justify sustained disguise and deception, as the 9/11 hijackers likely did. They are well prepared for the invisibility required by swarming. Such a movement is already practicing netwar in its daily operations.

The war in Iraq continues as a guerrilla struggle, with coalition forces seeking energetically to get inside the insurgents' OODA cycles. The global campaign against Al Qaeda continues, in much the same form as in early 2003. Viruses continue to spread wantonly across networks, without any proven cases of an electronic Pearl Harbor. Information warfare has emerged from its larval stage, and new I.O. organizations vie for global reach. Between them, Berkowitz and Kessler offer a useful framework for studying this pattern as it continues to emerge. ◻

Bryan Alexander is co-director of the Center for Educational Technology at Middlebury College. He researches and teaches about information technology in higher education, and he blogs at infocult.typepad.com and at smartmobs.com.

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That Old New Economy

A leftist tries to make sense of the '90s boom

Charles Oliver

After the New Economy, by Doug Henwood, New York: The New Press, 269 pages, $24.95

IT SEEMS LIKE only yesterday. Gross domestic product was booming. Labor productivity was skyrocketing. And price inflation, at least as measured by government statistics, was almost nonexistent. The stock market was climbing. Companies like Yahoo and Amazon and eBay were trading at 90 times earnings or more. And New Economy guru George Gilder was getting respectful write-ups in *The New York Times*.

Oh, wait a minute. That *was* yesterday.

The New Economy still seems alive, if not quite as healthy as it was in the late 1990s. But we don't hear the phrase *New Economy* as much, and we certainly don't hear the utopian claims that once were made by its boosters and prophets. People are more circumspect about claiming that new technologies will revolutionize the world.

The bursting of the stock market bubble, the dot-com shakeout, and the brief recession have chastened even the most wild-eyed New Economy zealots. Before those events fade into history, it probably would be a good idea if someone looked back at the late '90s and tried to separate the New Economy myths that were promulgated at the time from the reality, to explain the excesses of the era, to figure out why so many people overestimated the New Economy then and whether we are underestimating the New Economy now.

Unfortunately, Doug Henwood isn't that author and *After the New Economy* isn't that book. Henwood, editor of the *Left Business Observer*, has some interesting things to say about the late-'90s hype in *After the New Economy*, but his critique of the actual U.S. economy focuses on a much longer period, undermining his argument. For instance, he is concerned with what he perceives as growing inequality in U.S. incomes. He tells us that from the mid-1970s to the mid-'90s real hourly pay for those in the bottom third of income distribution fell. But he also says that real wages at all levels started to rise in 1996, only to fall again as unemployment rose in 2001. It's hard to see how any of that indicts the New Economy.

Still, Henwood gets off to a promising start, summarizing concisely the most grandiose claims of the period: "Computers had unleashed a productivity miracle, recessions were a thing of the past, ideas had replaced things as the motors of economic life, the world had become unprecedentedly globalized, work had become deeply meaningful, and mutual funds had put an end to class conflict." As Henwood reminds us, it wasn't just stock hucksters and science fiction writers making these claims. The first chapter is prefaced by this now embarrassing quotation from "the late, prestigious MIT economist Rudi Dornbusch": "The U.S. economy likely will not see a recession for years to come. We don't want one, we don't need one, and as we have the tools to keep the current expansion going, we won't have one. This expansion will run forever."

The book starts to go downhill after that. For his symbol of New Economy hype, Henwood picks the techno-prophet George Gilder. Fair enough. In magazine articles, speeches, newsletter reports, and books such as *Microcosm* and *Telecosm*, Gilder became perhaps the best known and most optimistic herald of the New Economy. Thanks to new technologies, Gilder told us, "all of the monopolies and hierarchies and pyramids and power grids of industrial society are going to dissolve." And that was one of his more modest predictions.

>> Messing With the Blues

also expands on the recent welcome trend of knocking down the walls between different styles of music, revealing that musicians, black and white, country and urban, freely stole from one another for decades, to everyone's benefit.

Wald uses artists' recording histories as a guide to their popularity and influence. This approach reflects the extent to which records were a transmission belt for popular culture as far back as the 1920s and '30s. (It also reminds us that fads are nothing new, as the spate of "Black Snake" songs—"That Black Snake Moan," "New Black Snake Blues," "That Black Snake Moan Number 2"—attests.) Wald tries to throttle the misconception that black artists were God-gifted but wild natives rather than practiced musicians with wide influences, experiences, and audiences. Leadbelly and Big Bill Broonzy in particular, Wald notes, were inaccurately branded Negro bumpkins. Sources as mainstream as *Life* spread this notion with such pieces as a Leadbelly feature titled "Bad Nigger Makes Good Minstrel."

But Wald's reliance on record sales soon leads him to equate cutting records with musical influence and standing. This is where the guitarist Robert Johnson comes in. Johnson never sold much of anything while he was alive, so Wald concludes Johnson does not matter as much as blues fans suppose. "As far as the evolution of black music goes, Robert Johnson »

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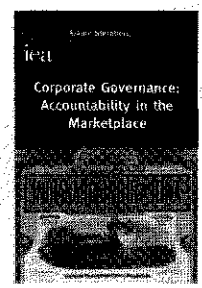
Corporate Scandals and Failures of Regulation

This New Book Explores Market Solutions to Corporate Malfeasance

Corporate Governance:
Accountability in the Marketplace
by Elaine Sternberg

$22.50

Corporate governance has come to prominence in recent years because of the political importance of issues such as executive pay and apparent accounting scandals such as Enron and Worldcom. As might be expected in this frenzied climate, politicians have reacted, with the passing of the Sarbanes-Oxley Act in particular.



Dr Elaine Sternberg brings some sobriety and clear thinking to the debate in this new and fully revised edition of *Corporate Governance: Accountability in the Marketplace*, lucidly defining the purposes of corporate governance and analysing different models of corporate regulation.

She argues that the Anglo-American model allows corporations to fulfil their corporate purposes more effectively than the stakeholder models. Given that problems of pay, accounting scandals and so on result in corporations not achieving their proper purposes, Sternberg finds that a change in the regulatory model is not the answer. Instead, she proposes that we should look at the ways in which regulation prevents the Anglo-American model from working in practice as effectively as it should in theory. Sternberg shows how a genuine 'market' in corporate governance could be created so that firms had to compete for funds, with their mode of governance being one of the attractions to potential shareholders.

"A rigorous philosophical argument that should be read by all interested in corporate governance."
Corporate Governance: An International Review

2003, Hobart Paper 147 (revised edition)
ISBN 0-255 36542-X, 212pp

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In 2000 Gilder presided over a small empire of newsletters and conferences. Then the stock market crashed. Companies that Gilder had touted, such as Global Crossing and WorldCom, floundered. And Gilder himself experienced a very public reversal in his own fortunes, as did those who'd sunk their money into the companies he hyped.

But here's the rub. Gilder was still right about a whole lot of things: the rapid growth of bandwidth, for instance, and the impact that would have on work, communication, and entertainment. Someone probably could write an entire book on what Gilder got right, what he got wrong, why he was right, and why he was wrong. (*Wired* attempted just that in its October 2002 article "The Madness of King George," but the piece only scratched the surface.) Yet Henwood doesn't seem too interested in that. He'd rather remind us of the non-P.C. and often retrograde views on sex and race that Gilder displayed in his earlier books *Men and Marriage* and *Visible Man*, or let us know that the furniture in Gilder's home is reportedly so shabby that "Goodwill wouldn't accept it as a donation."

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Henwood then turns to what really seems to interest him: numbers. His discussion of productivity figures is solid and generally fair. Measuring productivity is, as he argues, as much an art as a science. "An hour's labor may be an hour's labor, but how do you value the relative contributions of an experienced engineer and a janitor fresh out of high school?" he asks.

Henwood shows that, at least by some measures, the massive surge in productivity we've seen in the last seven or eight years is highly concentrated in a handful of industries. Northwestern University economist Robert Gordon, for instance, has persuasively argued that most of the acceleration of productivity has been restricted to the computer and high-tech sectors. McKinsey Global Institute found that wholesale and retail trade and security and commodity brokerages account for a disproportionate share of productivity growth.

If the acceleration of productivity is concentrated in so few sectors, can it be sustained? Can its effects really be widespread? Those questions get at the heart of the debate about whether new technology has really produced a New Economy. So far, the gains have been sustained, even during the brief recession, and lately they seem even to have accelerated. (The book doesn't explicitly acknowledge this, though the fact does show up in some of its charts.)

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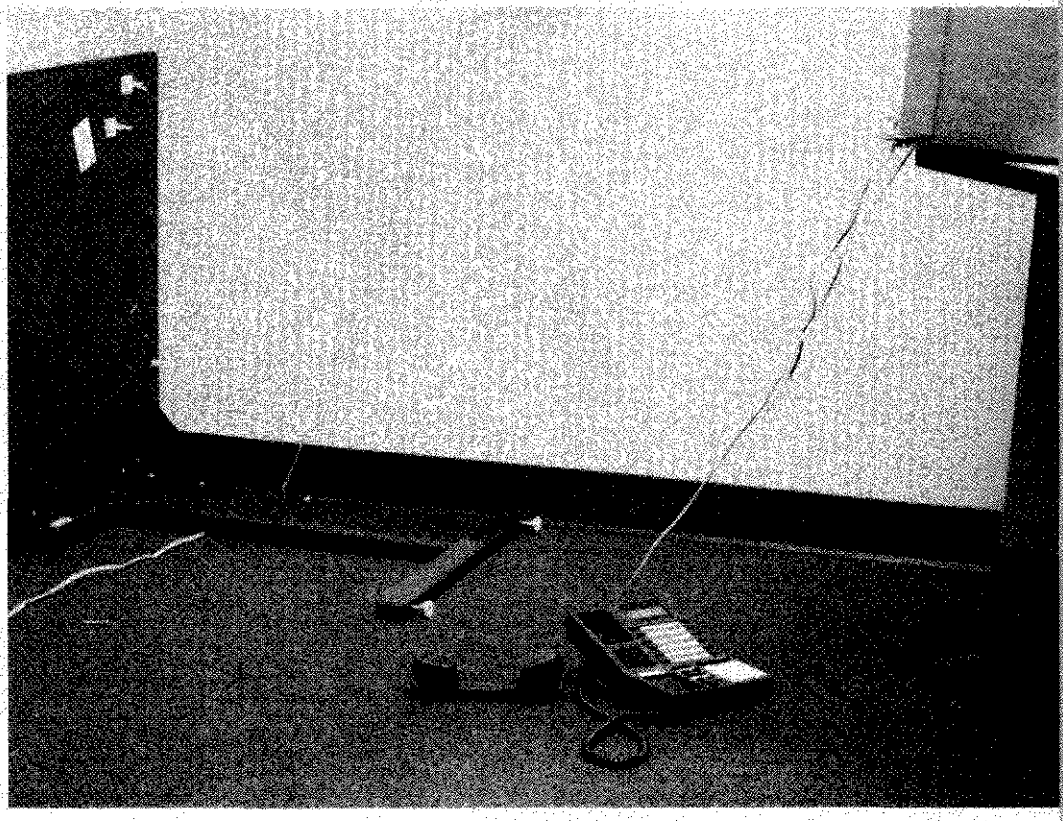
Henwood's discussion of income, the core of the book, is less satisfying. He argues that income inequality has been growing for three decades, with real hourly pay for the bottom third of earners falling, pay for the middle staying roughly flat, and pay for the top rising nicely.

Most economists say this trend is largely explained by an increasing rate of return to knowledge and skills. In other words, the wage premium earned by the highly skilled is increasing. But Henwood contends that the explanation lies in, among other things, "racial, sexual, and other forms of discrimination; the declining power of unions; the eroding minimum wage; cutbacks in social spending...persistent labor market turbulence (layoffs, restructuring, givebacks) that put workers on the defensive and weaken their bargaining power; relatively high rates of unemployment...and, more controversially, the increasing importance of international trade and immigration."

Yet just two pages later, Henwood grants that black households have made tremendous gains in income relative to whites since the early 1980s, and that "since 1993, even the poorest fifth of black households have enjoyed stronger income gains than whites." The shrinking of the gender gap in income is "even more dramatic," he acknowledges. So much for racial and sexual discrimination as a primary explanation for the growing income gap.

As for immigration, Henwood really glosses over the subject, barely pausing to note that the influx of poor Hispanic immigrants drags down the income average for that group. Harvard economist George Borjas estimates that each 10 percent increase in the supply of labor through immigration reduces wages of natives by 3 percent to 4 percent.

It's simple enough economics. The more of something there is, all other things held constant, the lower the price it can command on the market. Adding millions of low-skilled workers to the economy should drive down the wages of those with low skills. A 1997 report from the



After the New Economy (cover detail)

was an extremely minor figure," he claims, "and very little that happened in the decades following his death would have been affected if he had never played a note."

That seems an awfully strong statement, one which requires a level of knowledge that Wald simply cannot have. Worse, it calls into question the words of such unimpeachable bluesmen as Muddy Waters and Son House, who in many interviews put Johnson in the hall of players who influenced them and had a distinct sound, if not a wide popular following.

Wald questions such testimony. "In assessing Johnson's local reputation," he cautions, "it is worth noting that the first white, northern blues fan that House, Waters, Honeyboy Edwards, and other Delta players met was already an ardent Johnson admirer. One has to wonder what effect this had on their own estimation of their onetime peer."

No, one does not. It does not seem to occur to Wald that the bluesmen might have actually *liked Johnson's music.*

Perhaps it is nothing more than a historical accident that Johnson's music came to light in 1961 just as young British kids tired of skiffle looked to America for the latest new, old thing. And it makes sense that a blues-rocker like Eric Clapton would try to ground a 10-minute guitar wank fest in the blues tradition by tying it to the primal Johnson myth of a devil's bargain and a desolate crossroad. »

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National Research Council found that almost half the decline in real wages for native-born high school dropouts from 1980 to 1994 could be explained by competition from immigrant workers. None of that necessarily means we should end immigration, but it does mean that we should recognize it has costs.

Henwood stands on firmer ground when he tackles globalization. He finds that, for many leftists, globalization is a nebulous concept applied to "everything bad that's happened over the last decade or two." He also points out that "antiglobalizers are frequently antidevelopmentalists as well, and like [Ralph] Nader, sport a closet full of hair shirts, not just for themselves but for everyone in sight."

Technology alone won't end oppression or guarantee an endless economic boom. Nor can new technology protect us from the bad policies of lawmakers.

Henwood argues that both globalization and economic development have definite benefits, although he also argues that the institutions under which both processes are currently taking place advantage capital over labor. He also does a good job of putting the current debate over globalization into historical context. "Early capitalism wasn't as local and personal as myth has it; from its beginning it was deeply international," he notes. "In the early U.S., early nineteenth century merchants imported British industrial goods and exported cotton, acting as financiers at every stage."

The book even comes tantalizingly close to putting the New Economy into historical context. "The early days of the telegraph were laden with fantasies of universal peace, love and understanding, very similar to some of our more fervent web enthusiasts—and even 'web' metaphors were themselves common," Henwood writes.

Indeed, the telegraph was a huge advance in communication, arguably a bigger advance over what then existed than the Internet has been. And it, too, revolutionized commerce and industry. The telegraph assisted the spread of railroads, for instance, by making it possible to communicate train schedules, synchronize time across distances, and warn operators of any disruptions.

The automobile, the telephone, and radio, to name just a few examples, also had profound changes on the way people lived and worked, but those changes weren't inevitable. Both Marx and the New Economy prophets were wrong: There are no historical laws.

Technology alone won't end oppression or guarantee an endless economic boom. Nor can new technology protect us from the bad policies of central bankers or lawmakers. That's something we found out when Federal Reserve Chairman Alan Greenspan raised interest rates in the late 1990s, temporarily choking economic growth and sending the stock market plummeting.

A sober appraisal of the New Economy would try to find out what mistakes were made in the '90s and who made them; it would ask what institutional arrangements would help us best realize the potential of new technologies. On the few occasions when Henwood actually tries to do this, he can be perceptive. Far too much of this book, however, focuses not on the New Economy but on old complaints about capitalism. ▪

Contributing Editor Charles Oliver (oliverc2@yahoo.com) covers local government for The Daily Citizen in Dalton, Georgia.

Escaping the Delta (book jacket detail)

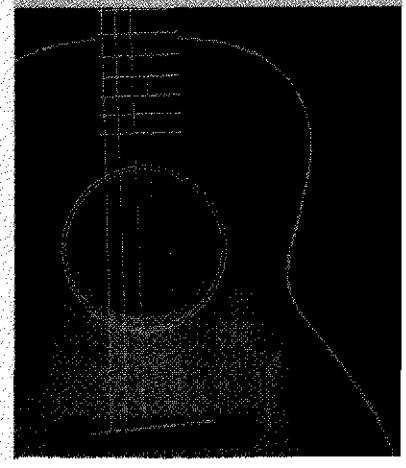
>> Messing With the Blues

Wald seems to resent this hijacking of his orderly narrative in which the blues exists on its own terms, independent of marketing stratagems, record store bins, or the embrace of ardent but confused popularizers and disciples. But culture, especially musical culture, doesn't flow like gelatin into predictable molds. It bubbles and gurgles along, popping up in unexpected places and unexpected forms. When Clapton's future Cream cohort Ginger Baker was playing Robert Johnson tunes with British blues revivalist Alexis Korner in the 1960s, who could have guessed that one day he'd be jamming with über-punk Johnny Rotten's '80s band Public Image Ltd.?

That sort of shock is the norm when music hits a universal nerve. Almost a century of popular music gets condensed into three minutes here, two minutes there. Marginally popular artists suddenly hold great sway. It happens all the time.

The blues doesn't need Wald's kind of revision. Just the occasional revival. ▪

Jeff A. Taylor (jtaylor@reason.com) writes **reason express**, *a weekly news commentary for* **reason online** *(reason.com).*



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Mr. Showbiz Goes to Washington

Wish-fulfillment fantasies and paranoid nightmares

Jesse Walker

SEVENTY YEARS AGO, Hamilton MacFadden made a New Deal comedy called *Stand Up and Cheer*. Quick summary: The president creates a new Department of Amusement because Americans are so depressed, what with the Depression and all. A Broadway producer takes the helm and, in a great feat of central planning, organizes a massive entertainment drive. This angers a cabal of evil businessmen, who somehow are profiting from the bad times, so they conspire to bring the new agency down. The noble impresario rebuffs their efforts; and the country, inspired by his not-quite-Keynesian stimulus, emerges happily from the Great Depression. The end.

Hollywood's most popular products are wish fulfillment and nightmares, and its political pictures offer big doses of both. The fantasy of a political savior has been a movie mainstay from the birth of the talkies to today: If it's not a secretary of amusement, it's a naive congressional freshman (*Mr. Smith Goes to Washington*, 1939), a crusading lady populist (*The Farmer's Daughter*, 1947), or a Democrat's fantasy of what he really, really wishes Bill Clinton could be (*The American President*, 1995). It's no surprise that both leading candidates for the White House offer public personas already familiar from the movies. John Kerry is the war hero (his handlers having decided that *Sergeant York* is a better sell than *Born on the Fourth of July*), while George W. Bush is the regular Joe, just like you 'n' me, bringing common sense and whatnot to Washington. Kinda like Mr. Smith.

There are certain differences between Mr. Smith and Mr. Bush, of course, among them the odd circumstances under which Bush attained his office: He was anointed after a legal coin toss, whereas Smith was anointed after an *actual* coin toss.

That's another movie tradition. Modern audiences in particular seem to find it unbelievable that a good man could reach a high office in the conventional manner. Instead we get retreads of a formula that goes at least as far back as *Gabriel Over the White House* (1933), in which a puppet president survives an accident, sees the light, and starts to stand up for the little guy and fight the powers that be. There's the disillusioned senator who thinks he's about to die, sees the light, and starts to stand up for the little guy and fight the powers that be (*Bulworth*, 1998); the slick crook who cons his way into Congress, sees the light, and starts to stand up for the little guy and fight the powers that be (*The Distinguished Gentleman*, 1992); the lowly alderman who runs for president as a sacrificial lamb, sees the light, and starts to stand up for the little guy and fight the powers that be (*Head of State*, 2003); the look-alike who secretly takes the president's place, sees the light, and starts to stand up for the little guy and fight the powers that be (*Dave*, 1993).

Purists will note that Bush has yet to start standing up for the little guy and fighting the powers that be. But while I'm no fan of the president, I think I'd like him even less if he started channeling the Humphrey-Hawkins Full Employment Act, à la *Dave*, or rapping about socialized health care, à la *Bulworth*. Or, worse, acting on divine instructions and using extraconstitutional military tribunals against those he deems the country's enemies, à la *Gabriel Over the White House*. Oh, wait....

The only political archetype that's more common than the savior is the cabal. An optimistic potboiler requires a hero and some villains; a pessimistic one just needs the villains. Richard Condon's cynical novels have inspired two of the most enjoyably paranoid takes on American government, *The Manchurian Candidate* (1962) and the best of the Kennedy assassination movies, the wonderfully dark comedy *Winter Kills* (1979). The same spirit animates many other comedies and thrillers, from *The President's Analyst* (1967) to *The Parallax View* (1974).

But they're just the tip of the genre. If you don't care for Aaron Sorkin and Rob Reiner's vision of a saintly Democrat fending off Gingrichite grinches in *The American President*, then turn to the nightmare on the other side of the wish-fulfillment fantasy: You and the specter of Vince Foster can enjoy a radically different vision of the Clinton years in two 1997 films, *Murder at 1600* and Clint Eastwood's *Absolute Power*.

More realistic, and arguably more cynical, is what may be my favorite campaign picture. In *The Candidate* (1972), there's no need for a cabal—the protagonist simply has his own weaknesses, and the system simply has its own logic. *The Candidate* reverses the *Mr. Smith* formula: Instead of idealism overcoming corruption, it shows us an idealist getting corrupted.

That said, the film's greatest charm isn't its moral. It's its flavor. The fly-on-the-wall style, the extra

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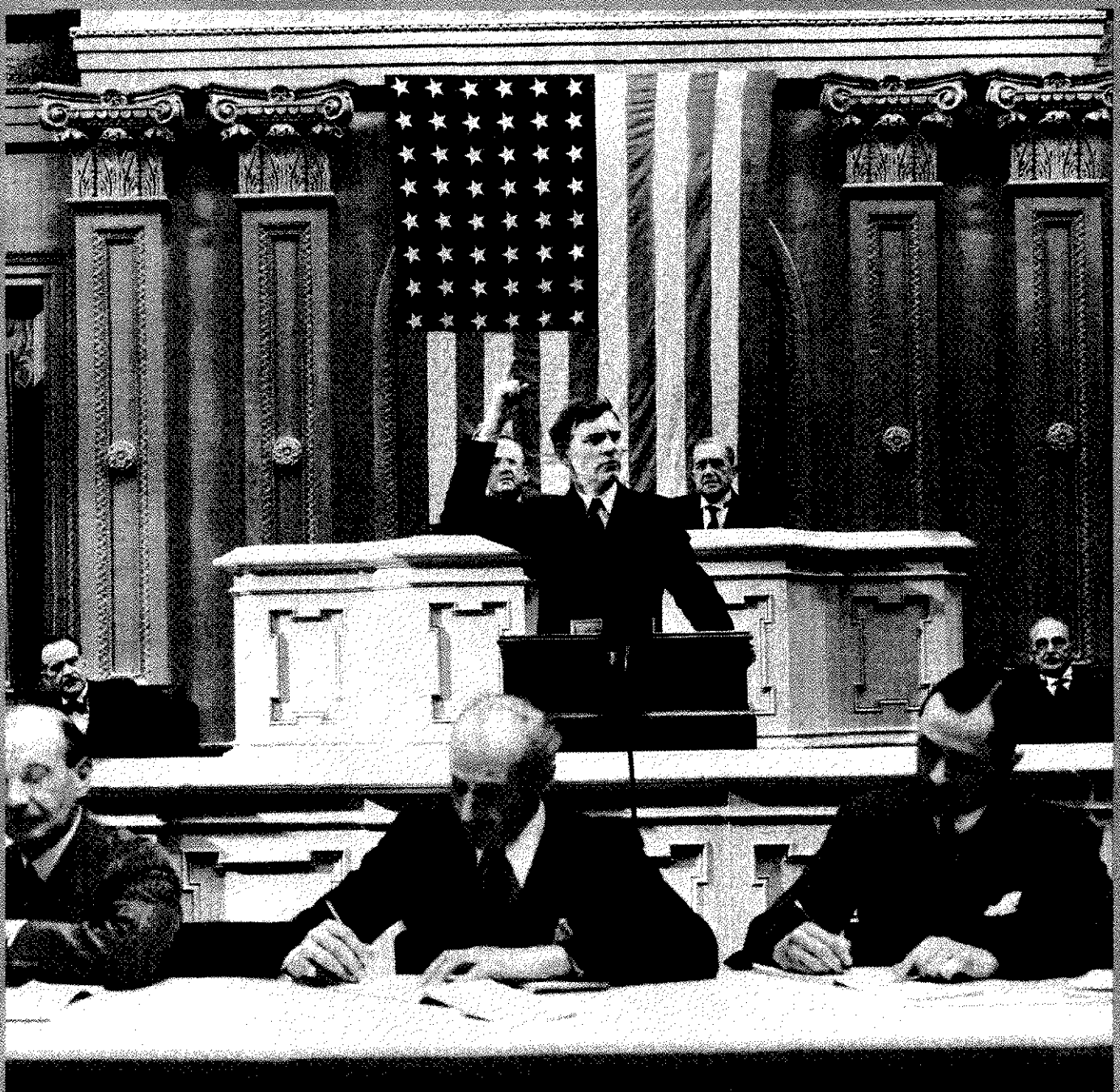

Gabriel Over the White House. ©Everett Collection

story lines lurking in the background, the savvy take on the media—between them, they make this the oldest political movie I can think of that still feels contemporary. (Assuming you can get past the media consultant's primitive technology and the occasional references to such dormant issues as busing.) The picture feels like it was made by someone who'd actually spent some time on the campaign trail.

That's a rare quality. Most political flicks, even the good ones, suffer from a seriously distorted vision of their subject. The most egregious case in recent years is *The Contender* (2000), another liberal fantasy. Writer-director Rod Lurie is so tone-deaf that he seems to think a popular, moderate, Midwestern politician would call for draconian gun controls; worse, he thinks a potential vice president's youthful sexcapades would be more of a hot potato than her open atheism. It's at times like these that one hopes the candidates are smart enough not to take *all* their cues from the movies.

Though on second thought, I kind of like the idea of Bush as a rapping socialist after all. Bring it on! ✱

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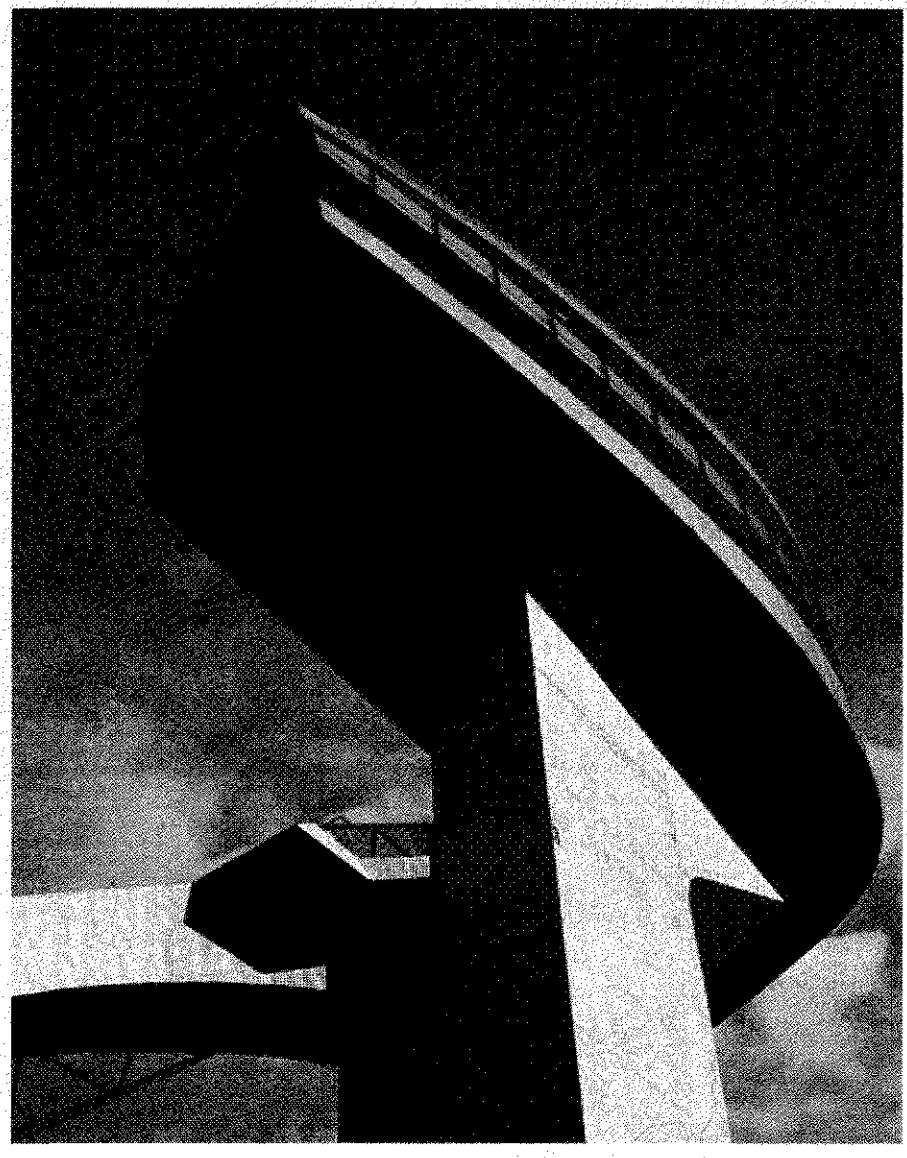
Fluid Structure

Charles Paul Freund



©Helene Binet

THIS DRAMATIC SKI jump in Innsbruck, Austria, described by *The New York Times* as "a swoosh in steel," is the work of Zaha Hadid, the winner of this year's Pritzker Architecture Prize. The structure's energy is typical of Hadid's designs, which are often marked by unusual rhythms and movement. Her design for a winding Naples train station that arches the tracks, for example, seems as much in motion as the trains it will serve.

Such "motion" has become a mark of Hadid's work. Although she has spent her career in London, she is an Iraqi exile, and at least one paradox-minded critic has sought the source of her forward-looking dynamism in the timeless rhythms of the Middle East. Herbert Muschamp, a long-time admirer of Hadid, has suggested that her "emphasis on movement derives from the nomadic traditions of her native Iraq."

Accurate or not, the thought's worth pondering. Much dramatic contemporary design—like the "blob" buildings of Frank Gehry—has its practical origins in the matrix of imagination and computing. Conceiving Hadid's fluidity as a legacy of nomadic tradition not only humanizes a digitized architecture that may otherwise seem alien, it recasts ancient and seemingly static tradition as a source of dynamic change.

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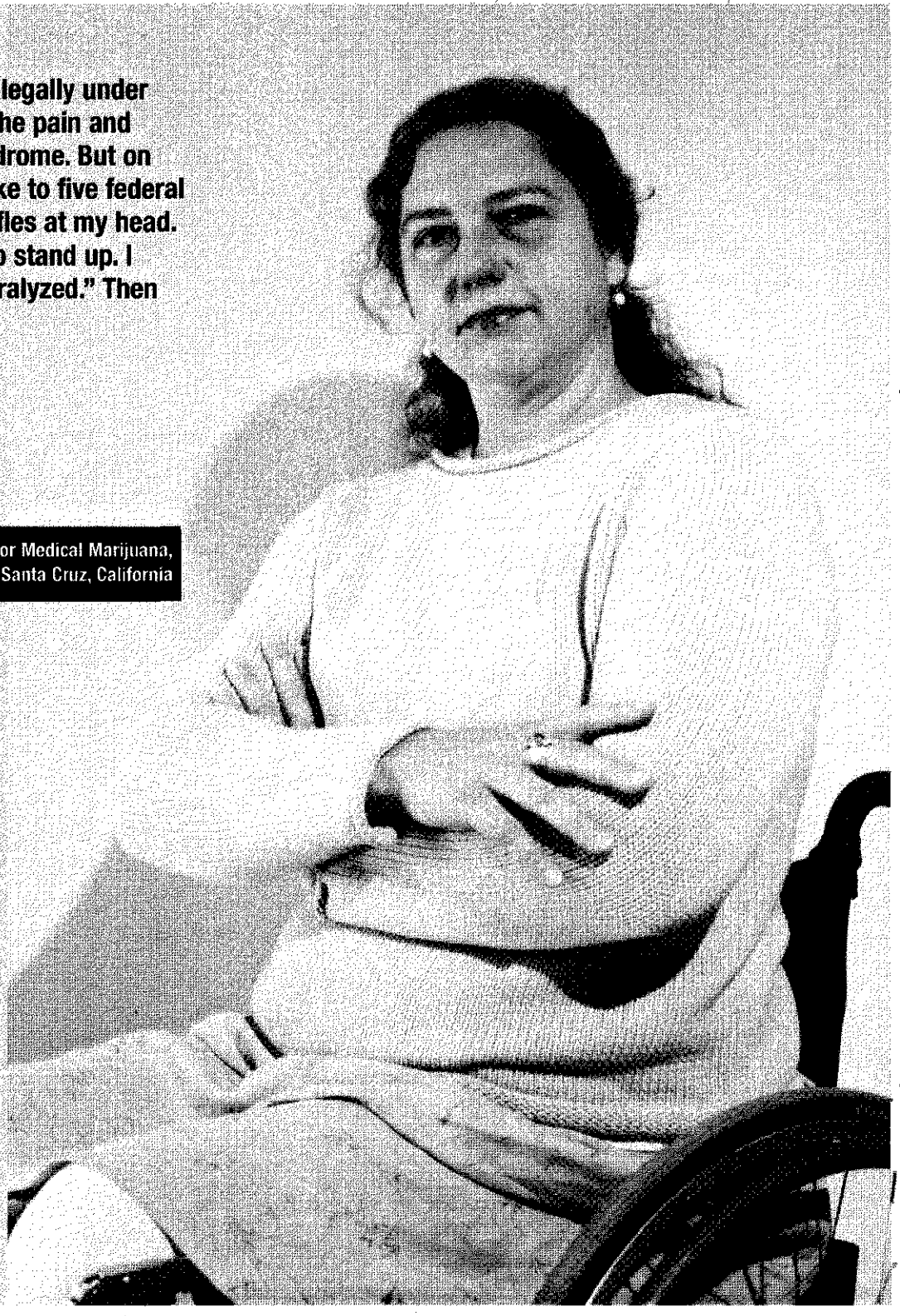

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